Nebraska Law Review

Volume 88 | Issue 1 Article 3

2009

A Shared Existence: The Current Compatibility of the Equal Protection Clause and Section 5 of the Voting Rights Act

Jocelyn F. Benson
Wayne State University Law School

Jocelyn F. Benson*

A Shared Existence: The Current Compatibility of the Equal Protection Clause and Section 5 of the Voting Rights Act

TABLE OF CONTENTS

I. Introduction 125
II. The Evolution of Section 5, the Fourteenth Amendment, and Concerns over their Shared Existence 128
A. Section 5 of the Voting Rights Act, 1965–2006 128
B. Race, Districting, and the Constitution, 1965–2000 . 137
1. *Shaw v. Reno* and the Equal Protection Clause . 138
2. The Post-*Shaw* Deluge: *Miller v. Johnson* 143
3. The Post *Miller* and *Shaw* Deluge: The Constitution, Redistricting, and the Mid- to Late-1990s 147
III. Section 5, the Constitution, and Redistricting Following the 2000 Census 150
A. Redistricting Litigation in the Big Three: Georgia, North Carolina, and Texas 152
1. Georgia 152
2. North Carolina 154
3. Texas 156
B. Redistricting Litigation in Other States Covered Under Section 5 159
1. Virginia 160
2. Mississippi 161
3. Alabama 162
4. California 163

* Assistant Professor of Law, Wayne State University Law School. B.A. 1999, Wellesley College; M. Phil. 2001, Oxford University; J.D. 2004, Harvard Law School. I am grateful for the suggestions and comments that Michael Pitts, Ellen Katz, Ellen Dannin, and others provided in the formulation of this article. All errors and omissions are my own.

5. New York 164
6. South Dakota 165
7. Arizona, Florida, and the Rest 166
C. How Section 5 Jurisdictions Achieved Universal Compliance with the *Shaw/Miller* Doctrine 167
IV. Did the 2006 Reauthorization of Section 5 Affect the Current Synergy Between Section 5 and the Equal Protection Clause? 170
A. The *Bossier Parish II* "Fix" 172
B. Clarifying *Georgia v. Ashcroft* and the "Ability to Elect" 175
V. Conclusion 179

I. INTRODUCTION

On June 26, 2003, the United States Supreme Court issued its opinion in *Georgia v. Ashcroft*.[1] Initially the opinion, which significantly altered the established legal test for evaluating retrogression under Section 5 of the Voting Rights Act,[2] failed to garner much attention. This was in part due to the complex nature of the decision, and partially because the opinion was issued nearly simultaneously to two long-awaited "blockbuster" opinions—the rejection of state anti-sodomy laws in *Lawrence v. Texas*[3] and the affirmation of the use of affirmative action in education in *Grutter v. Bollinger*.[4] Regardless, Justice Sandra Day O'Connor's majority opinion in *Ashcroft*, evaluating a Georgia state legislature redistricting plan, concluded that an apportionment plan that moved African American voters from a district where they were the majority of voters to one in which they were a minority but arguably sizeable enough to wield some level of "influence" over the outcome of the election was not "retrogressive" or otherwise a violation of Section 5 of the Voting Rights Act.[5]

1. 539 U.S. 461 (2003).
2. *See infra* text accompanying notes 25–61. For a deeper discussion of *Georgia v. Ashcroft* and its problematic reinterpretation of Section 5, see, for example, Pamela S. Karlan, Georgia v. Ashcroft *and the Retrogression of Retrogression*, 3 ELECTION L.J. 21, 21 (2004) ("The Court's opinion [in *Georgia v. Ashcroft*] fundamentally alters the pre-clearance process in disturbing ways."). *See also id.* at 36 (summarizing the holding as "a retrogression in minority voters' effective exercise of the electoral franchise").
3. 539 U.S. 558 (2003).
4. 539 U.S. 306 (2003).
5. *Ashcroft*, 539 U.S. at 487–89. The United States District Court for the District of Columbia found that the plan eliminated majority-minority districts in areas where voting was racially polarized and greatly reduced the percentage of the black voting age population (BVAP) in other majority-minority districts. *See* Georgia v. Ashcroft, 195 F. Supp. 2d 25, 95–97 (D.D.C. 2002). Other districts where the majority of voters were Democrats saw the BVAP rise to levels between

Following Justice O'Connor's extensive thirty page opinion in *Ashcroft* was a small, two paragraph concurrence from Justice Anthony Kennedy.[6] At just under 300 words, Kennedy's opinion was brief, but it packed an ominous punch. Kennedy agreed that the redistricting scheme did not violate the statutory requirements of Section 5 of the Voting Rights Act.[7] But Kennedy's greater concern was that the apportionment plan potentially violated the Equal Protection Clause of the Fourteenth Amendment.[8] In his own majority opinion in *Miller v. Johnson*,[9] Justice Kennedy had written that race cannot be the predominant factor in redistricting.[10] As such, Kennedy concluded in *Ashcroft*, "considerations of race that would doom a redistricting plan under the Fourteenth Amendment or Section 2 seem to be what save it under Section 5."[11]

Kennedy's concurrence went on to declare: "There is a fundamental flaw . . . in any scheme in which the Department of Justice is permitted or directed to encourage or ratify a course of unconstitutional conduct in order to find compliance with a statutory directive."[12] In other words, Kennedy hinted, if the Justice Department's interpretation of Section 5 of the Voting Rights Act leads attorneys to approve districting plans that violate the *Miller v. Johnson* interpretation of the Fourteenth Amendment, the statute is fundamentally flawed.

This article seeks to challenge the view that the Justice Department's current enforcement of Section 5 of the Voting Rights Act compels drafters of apportionment plans to use race as a predominant factor in the districting process, in violation of *Miller v. Johnson*[13] or its predecessor, *Shaw v. Reno*.[14] Specifically, I argue that a shift in the Justice Department's behavior in the post-2000 redistricting cycle and subsequent Supreme Court decisions, such as *Easley v. Cromartie*,[15] indicate any dissonance between Section 5 and the Fourteenth Amendment in the redistricting context is now rectified.

This is apparent in a review of the redistricting cases that followed the 2000 census, after which every state redrew its district lines as required under *Reynolds v. Sims*.[16] States were required to adhere to

---

25% and 50% of the entire district—slightly higher than the overall state average of 25.42% but less than a majority. *Id.* at 44.

6. 539 U.S. at 491–92 (Kennedy, J., concurring).
7. *Id.*
8. *Id.*
9. 515 U.S. 900 (1995).
10. *Id.* at 911–13.
11. *Ashcroft,* 539 U.S. at 491.
12. *Id.*
13. 515 U.S. 900 (1995).
14. 509 U.S. 630 (1993).
15. 532 U.S. 234 (2001).
16. 377 U.S. 533 (1964) (holding that congressional and state legislative districts must be roughly equal in population under the Equal Protection Clause of the

the constitutional mandate under *Shaw* and *Miller*, and every jurisdiction covered under Section 5 of the Voting Rights Act was required to submit their redistricting plans to the U.S. Department of Justice to ensure that they complied with the non-retrogression standard of Section 5. As Part II of this Article details, in no instance was any plan drawn in compliance with Section 5 found to be unconstitutional under *Shaw* or *Miller*. The fear that compliance with Section 5 required the Justice Department to encourage or direct "unconstitutional conduct" in drawing district lines was never realized.

Or, at the very least, that fear did not come to pass in the redistricting cycle that immediately followed the establishment of these principles. The story does not end there. In August of 2006, President Bush signed the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006.[17] Among other things, the law reauthorized Section 5 for an additional twenty-five years and specifically clarified the provision with regards to two previous Supreme Court decisions: *Reno v. Bossier Parrish School Board (Bossier II)*[18] and *Georgia v. Ashcroft*.[19]

Part III of this Article details these amendments to Section 5. The amendments specifically require the rejection of any new apportionment plan or other change that is motivated by a discriminatory purpose (thus clarifying the Court's holding in *Bossier II*).[20] The changes also clarify Justice O'Connor's definition of "retrogression" in *Georgia v. Ashcroft* to ensure that localities are required, under Section 5, to protect a minority community's ability to elect their preferred candidate of choice.[21]

So if, as this Article contends, compliance with Section 5 did not compel any unconstitutional behavior in the 2000 round of redistricting, the question becomes whether Section 5, as reauthorized in 2006, will compel any unconstitutional behavior in 2010 and beyond.[22] To that end, Part III sets forth the argument that none of the changes to Section 5 during the reauthorization process should give rise to any concern of unconstitutional behavior. In particular, I detail how the two aforementioned amendments to Section 5—a reinvigoration of the

---

U.S. Constitution). *Reynolds* thus requires all districting plans to be revisited following every decennial Census to ensure that districts are equally apportioned. *Id.*

17. Pub. L. No. 109–246, §§ 4–5, 120 Stat. 577, 580–81 (codified as amended at 42 U.S.C.A. §§ 1973b–1973c (West 2000 & Supp. 2008)) [hereinafter VRARA].
18. 528 U.S. 320 (2000).
19. 539 U.S. 461 (2003).
20. *See* VRARA, *supra* note 17. *See also infra* text accompanying notes 336–354.
21. *See* VRARA, *supra* note 17. *See also infra* text accompanying notes 344–367.
22. The U.S. Supreme Court specifically confirmed in *LULAC v. Perry*, 548 U.S. 399 (2006), that states are permitted to redraw district lines in the middle of a decade.

intent standard and a protection of a community's opportunity to elect their preferred candidate—do not require authors of redistricting plans to use race as a predominant factor or otherwise violate the U.S. Constitution.

II. THE EVOLUTION OF SECTION 5, THE FOURTEENTH AMENDMENT, AND CONCERNS OVER THEIR SHARED EXISTENCE

The United States Constitution and Section 5 of the Voting Rights Act have a historically supportive and amicable relationship, as the Court articulated shortly after the 1965 passage of Section 5 in *South Carolina v. Katzenbach*.[23] This section seeks to detail both the development of Section 5 and the concurrent evolution of the Fourteenth and Fifteenth Amendments to the U.S. Constitution. I argue that the trajectories of both should be seen more as complementary and compatible than inconsistent and obstructive, as Justice Kennedy's concurrence in *Georgia v. Ashcroft*[24] suggests.

A. Section 5 of the Voting Rights Act, 1965–2006

Section 5 was added to the Voting Rights Act in 1965 to ensure the systematic enforcement of the statutory prohibition of racial discrimination in voting, in recognition of the consistent tendency of state and local jurisdictions to stay "one step ahead" of the federal government through passing "new discriminatory voting laws as soon as the old ones had been struck down."[25] Congress enacted the provision in an effort to "shift the advantage of time and inertia from the perpetrators of the evil to its victim," through instituting a process that disallowed any changes to election procedures "unless the changes can be shown to be nondiscriminatory."[26]

The provision is notably limited in its application—enforceable only in states and localities that meet the requirements of its coverage formula.[27] The coverage formula is designed to capture jurisdictions

23. 383 U.S. 301 (1966).
24. 539 U.S. at 491 (Kennedy, J., concurring).
25. H.R. REP. No. 94-196, at 57–58 (1975). *See also* City of Lockhart v. United States, 460 U.S. 125, 141 (1983) (Marshall, J., dissenting) (noting that Section 5 was enacted to ensure "that old devices for disenfranchisement would not simply be replaced by new ones"); H.R. REP. No. 89-439, at 10 (1965) (noting that "[b]arring one contrivance too often has caused no change in result, only in methods"). Dan Tokaji describes these patterns among state and local jurisdictions as "resilient as the many-headed hydra, with new disenfranchising methods repeatedly sprouting up in place of the ones most recently removed." Daniel P. Tokaji, *If It's Broke, Fix It: Improving Voting Rights Act Preclearance*, 49 How. L.J. 785, 791 (2006).
26. H.R. REP. No. 94-196, at 58 (1975).
27. *See* 42 U.S.C.A. § 1973b (West 2000 & Supp. 2008).

with a history of discrimination. It therefore includes jurisdictions that employed a prohibited test or device and in which less than half its population was registered to vote or voted in the 1964, 1968 or 1972 presidential elections.[28] In 1975, coverage was also extended to jurisdictions with substantial numbers of language minorities that failed to provide translated election materials.[29] As a result of these extensions, Section 5 coverage now includes nine states—Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia—as well as local jurisdictions in California, Florida, Michigan, New Hampshire, New York, North Carolina, and South Dakota.[30]

A jurisdiction covered under this formula was required to submit any new or revised "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting," to the federal government for approval or "preclearance."[31] Congress placed the power of "preclearance" in the hands of "the safely nonsouthern"[32] District Court of the District of Columbia and the Civil Rights Division of the United States Justice Department.[33] To obtain preclearance, a covered jurisdiction must generally prove to one of these entities that its new or revised election procedure "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color."[34] Though jurisdictions can obtain preclearance via a declaratory judgment from the District Court of the District of Columbia, the vast majority opt for a more efficient and less costly review from the Justice Department, which completes most preclearance reviews in under sixty days and, in the view of some commentators, sometimes involves "a brokered give and take"[35] between the jurisdiction and the Justice Department Attor-

28. *Id.*

29. Pub. L. No. 94-73, 89 Stat. 400 (1975).

30. 28 C.F.R. § 51 app. (2006). The U.S. Supreme Court held in 1999 that covered local jurisdictions in states that are not entirely under Section 5 must submit any election law changes made on the state level that are to be implemented in covered local jurisdictions. Lopez v. Monterey County, 525 U.S. 266, 269 (1999).

31. 42 U.S.C.A. § 1973c (West 2000 & Supp. 2008).

32. J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965–2007*, 86 TEX. L. REV. 667, 681 (2008) (noting that Congress chose "the safely nonsouthern District Court of the District of Columbia . . . to be the principal venue for vetting new southern election laws that might seek to evade the movement toward electoral equality").

33. *See id.* at 679–86 (describing how the Justice Department was given the primary responsibility for administering Section 5).

34. *Id.* at 678.

35. Meghann E. Donahue, *The Reports of My Death are Greatly Exaggerated: Administering Section 5 of the Voting Rights Act After* Georgia v. Ashcroft, 104 COLUM. L. REV. 1651, 1656 (2004).

neys.[36] If the Justice Department objects to the proposal, then the state or subdivision has the option of appealing to the district court to obtain a declaratory judgment stating that the law satisfies the requirements of Section 5.[37]

Because of the sensitive federalism issues involved in its enforcement, and because individual attorneys in the Justice Department play a significant role in ensuring its application remains consistent with judicial interpretation, it is no surprise that Section 5 has evolved considerably since its initial enactment. Apart from the changes to the coverage formula, the Justice Department has seen an exponential growth in the number of preclearance submissions—from roughly 300 in the first five years of its enactment to 50,000 between 2000 and 2002.[38] In addition, the provision, as with the Voting Rights Act in its entirety, has progressed from a law that was initially employed to dismantle barriers to participation,[39] to one that is charged with reviewing any law that impacts a community's participation or representation at the state and local level.[40] In its 1968 decision in *Allen v. State Board of Elections*,[41] the Supreme Court liberally defined the scope of the definition of election laws and procedures in the "broadest possible" manner to include laws regulating "electoral structures."[42] As a result of *Allen*, Section 5 jurisdictions are required to obtain preclearance of any redistricting changes or shifts from dis-

36. *See id.* at 1656–57 (noting that "between 1990 and 1995, the Voting Section analyzed 2,822 redistricting submissions while jurisdictions submitted just eight [changes] to the district court for declaratory judgment. . . . [T]he Department is and always has been the prime decision maker for Section 5 determinations") (internal quotations omitted).

37. 42 U.S.C.A. § 1973c (West 2000 & Supp. 2008).

38. Victor Andres Rodriguez, *Section 5 of the Voting Rights Act of 1965 After* Boerne*: The Beginning of the End of Preclearance?*, 91 CALIF. L. REV. 769, 782 (2003) ("[I]n the first five years after the Act's passage . . . only 323 Section 5 changes were submitted to the Attorney General for review. In the next five years (1970–1974), only 4,153 changes were submitted. . . . [T]he number of submissions increased dramatically in the 1980s and 1990s. Almost 50,000 changes have been submitted in the three most recent years on record (2000–2002), a number that exceeds the total submitted in the first fifteen years of the Act's life."). This growth in submission is detailed and explained by Morgan Kousser, *supra* note 32, at 684–85.

39. Tokaji, *supra* note 25, at 793 ("The first generation of VRA enforcement consisted mainly of dismantling existing barriers to participation—and preventing new ones from popping up in their place. . . . In the seven covered states, the percentage of voting-eligible African Americans who were registered rose from just 29% before the VRA to over 52% by 1967.").

40. Allen v. State Bd. of Elections, 393 U.S. 544, 566–71 (1968).

41. *Id.*

42. *Id.* at 567.

trict-based to at-large elections, and any other change that would affect the effectiveness of a citizen's vote.[43]

These developments in the scope and meaning of Section 5 are minor, however, in comparison to the evolution of the standard for evaluating, approving, and rejecting election laws and procedures under Section 5. Though applied and embodied through the enforcement efforts of the Justice Department, the U.S. Supreme Court has played a considerable role in driving and defining the progression of this standard. Most significant is the Court's 1976 decision in *Beer v. United States*.[44] In *Beer*, the Court instituted the seminal definition for evaluating whether a change to an election law or procedure would have the "effect of denying or abridging the right to vote on account of race or color,"[45] concluding that such an effect occurs only when a voting change "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."[46] Under the Court's "retrogression" standard, the Justice Department was directed to compare the electoral opportunities for voters of color under the previous[47] and new provisions, and, in the absence of evidence of discriminatory intent, reject the plan only if the attorneys concluded that the new provision would have the effect of reducing, or retrogressing, the existing electoral opportunities for communities of color.[48]

---

43. Mark Posner, *Time Is Still On Its Side: Why Congressional Reauthorization of Section 5 of the Voting Rights Act Represents a Congruent and Proportional Response To Our Nation's History of Discrimination In Voting*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 51, 67 (2007) (noting that Section 5 currently requires submissions of election changes that include: (1) voter registration standards, procedures, and locations; (2) polling place and early voting locations and precinct lines; (3) standards and procedures for voting on election day or before election day; (4) the use of languages in addition to English in administering elections; (5) election dates; (6) methods of election; (7) districting plans; (8) jurisdiction boundaries (because they determine eligibility to vote in particular elections); (9) candidate qualifications and qualifying procedures; (10) the number of elected officials and their term of office; and (11) initiative, referendum, and recall procedures).

44. 425 U.S. 130, 141 (1976) (concluding that Section 5 was enacted to "insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise"). For an extensive and detailed description of the facts and background of *Beer*, see Kousser, *supra* note 32, at 692–97.

45. *Beer*, 425 U.S. at 142.

46. *Id.* at 141.

47. The "previous" position in the redistricting context is the benchmark plan, defined as the plan that is either in effect when the new plan is submitted for preclearance, or where the current plan is unconstitutional or otherwise improper, the last constitutional, legally enforceable plan in effect in the state. *See* 28 C.F.R. §§ 51.54(b)(1), 51.58 (2006); J. Gerald Hebert, *Redistricting in the Post-2000 Era*, 8 GEO. MASON L. REV. 431, 441 (2000).

48. *See* Hebert, *supra* note 47, at 440–41.

According to Professor Michael Pitts, a former attorney in the voting section of the Civil Rights Division of the Department of Justice, in the decades following the *Beer* decision, the Attorney General's implementation of the retrogression "effects" test in the context of reviewing apportionment plans involved four steps, each in line with the view of retrogression as articulated in *Beer*:

> [T]he Attorney General reviewed a plan to determine if there were any districts that allowed minority voters to elect candidates of choice[,] . . . reviewed Census data to determine if any of these districts underwent a decrease in minority population[,] . . . examined voting patterns to determine if any reductions in minority population would result in the likelihood that minority voters would no longer be able to elect a candidate of choice[,] . . . [and] if it appeared minority voters had lost a district in which they could elect a candidate of choice (i.e., a retrogression had occurred), the Attorney General determined whether an alternative plan could be created that would not result in the elimination of such a district. . . . [I]f a plan resulted in an arguable loss of a district in which minority voters could elect a candidate of choice and a nonretrogressive plan could be drawn, the Attorney General would deny approval . . . .[49]

But the Supreme Court's view of which election changes earned preclearance under Section 5, and the Attorney General's subsequent implementation of that view, did not end with *Beer*. Notably, Congress barely touched Section 5 during the 1982 reauthorization process, implicitly accepting the Court's interpretation of Section 5 from *Beer* and, after much discussion, extended the preclearance requirements as they were for an additional twenty-five years.[50] The only significant change was Congress' decision to amend Section 5 to allow covered jurisdictions to "bailout" from under the purview of the provision,[51] if they could, among other things, produce evidence of their full compliance with the preclearance requirements and demonstrate that no test or device had been used to discriminate on the basis of race,

49. Michael J. Pitts, Georgia v. Ashcroft*: It's the End of Section 5 As We Know It (And I Feel Fine)*, 32 PEPP. L. REV. 265, 274–75 (2005).

50. For a detailed and extensive account of the 1982 reauthorization process for the Voting Rights Act generally, and Section 5 specifically, see Kousser, *supra* note 32, 704–16. *See also* Lisa Erickson, *The Impact of the Supreme Court's Criticism of the Justice Department in* Miller v. Johnson, 65 MISS. L.J. 409, 412–13 (1995) (describing the Congressional debate over extending the Section 5 and its endorsement of the Justice Department's work enforcing the provision since its 1965 enactment); *id.* at 412 (citing S. REP. NO. 97-417 at 11 (1982), *reprinted in* 1978 U.S.C.C.A.N. 177, 187) ("In making this determination, the [House Judiciary] Committee noted that although progress has been made toward equal opportunity in voting, racial and minority discrimination still affected the right to vote in states covered by section 5. In fact, the Committee stated that 'without the preclearance of new laws, many of the advances of the past decade could be wiped out overnight with new schemes and devices.'").

51. 42 U.S.C.A. § 1973b(a)(1) (West 2000 & Supp. 2008).

color, or language in the past ten years.[52] The second notable change came not from Congress but from the Justice Department, which, following the 1982 reauthorization, issued regulations that indicated an election law change that was a "clear violation" of Section 2 of the Voting Rights Act was sufficient to "withhold" preclearance.[53]

It was instead the Supreme Court that instituted the most sweeping changes to the provision, in part due to Justices' apparent disagreement with the Attorney General's enforcement of the provision.[54] Prior to the late 1990s, the courts and the Justice Department consistently viewed the purpose language of the provision, which "prohibit[s] any changes enacted with the purpose . . . of denying or abridging the right to vote based on race or color,"[55] as prohibiting the implementation of changes motivated by any discriminatory purpose. Specifically, this meant that under Section 5, in addition to rejecting plans with a retrogression effect, the Attorney General would also reject voting changes that would clearly violate Section 2 of the Voting Rights Act, which outlawed efforts to dilute the voting strength of communities of color,[56] and changes that were adopted with an unconstitutional discriminatory purpose.[57]

In one case with two separate holdings, issued four years apart, the U.S. Supreme Court intervened and curtailed these two practices. The *Reno v. Bossier Parish School Board*[58] cases dealt with the preclearance of a school board districting plan in Bossier Parish, Loui-

52. *Id. See also* Posner, *supra* note 43, at 63–66 (detailing the intent behind the bailout provision and its subsequent limited successful use by covered jurisdictions).

53. The regulation in its entirety read: "In those instances in which the Attorney General concludes that, as proposed, the submitted change is free of discriminatory purpose and retrogressive effect, but also concludes that a bar to implementation of the change is necessary to prevent a clear violation of amended Section 2, the Attorney General will withhold Section 5 preclearance." 28 C.F.R. § 51.55(b)(2) (1994).

54. For further description of the Justice Department preclearance determinations following the 1990 redistricting cycle, see, for example, Tokaji, *supra* note 25, at 799–804 (describing the increase of redistricting plans submitted for preclearance under Section 5 in the post-1990 reapportionment cycle, detailing the perception that the Justice Department "adopted a policy of requiring the 'maximization' of majority-controlled districts in the 1990s," and the effect of that perception on subsequent Supreme Court jurisprudence).

55. 42 U.S.C.A. § 1973c (West 2000 & Supp. 2008).

56. Under Section 2, an electoral system violates the Voting Rights Act if it effectively results in members of a racial or language minority having "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C.A § 1973(b) (West 2000 & Supp. 2008). *See also* Gingles v. Thornburgh, 478 U.S. 30 (1986) (holding that the use of multimember districts in North Carolina legislative apportionment resulted in an impermissible dilution of voting strength among a racial minority).

57. *See* Pitts, *supra* note 49, at 276–77.

58. 528 U.S. 320 (2000); 520 U.S. 471 (1997).

siana, a jurisdiction that previously had been subject to litigation due to its resistance to school integration laws and policies.[59] Despite the possibility of adopting a plan presented by the local chapter of the NAACP, which would have created two majority-African American districts, the School Board adopted a plan which had no majority-minority districts.[60] The plan therefore appeared to be a blatant violation of Section 2 of the Voting Rights Act, which, at the time of the Court's decision, was typically interpreted to outlaw districting plans that failed to create a majority-minority district where it was possible to create one. It also was possible that the rejection of the NAACP plan involved a discriminatory motive on behalf of the school board. The plan was, however, also non-retrogressive because both the present and the previous plan had failed to include a majority-minority district, making the present plan no worse than the previous plan.[61]

In its 1997 decision in the case *Reno v. Bossier Parish School Board* (*Bossier I*),[62] the Court evaluated a Justice Department decision to deny preclearance to an apportionment plan that clearly violated Section 2 of the Voting Rights Act. The Court in *Bossier I* overturned the Attorney General's denial of preclearance, finding that plans that may dilute minority voting strength in violation of Section 2 of the Voting Rights Act should still survive the preclearance process if they were non-retrogressive in effect and were not enacted with a racially discriminatory purpose.[63]

---

59. For a detailed account of the background leading up to the *Bossier Parish* cases, see, for example, Alaina C. Beverly, *Lowering The Preclearance Hurdle:* Reno v. Bossier Parish School Board, *120 S. Ct. 866 (2000)*, 5 MICH. J. RACE & L. 695, 696–98 (2000); Charlotte Marx Harper, *A Promise for Litigation:* Reno v. Bossier Parish School Board, 52 BAYLOR L. REV. 647, 652–55 (2000).

60. Beverly, *supra* note 59, at 696–97.

61. *See* Pitts, *supra* note 49, at 278 ("The Bossier Parish School Board plan presented a situation where the Attorney General attempted to use Section 2 to force the creation of majority-minority districts when the jurisdiction already employed single-member districts. Prior to 1990, the Board had twelve districts, but none of them had a population comprised of a majority of African-Americans. After the 1990 Census . . . the Board adopted a redistricting plan that once again failed to include any district with a majority of African-American population, even though it would have been possible for the Board to create two such districts.").

62. 520 U.S. 471.

63. Hebert, *supra* note 47, at 443 ("Over the years, the DOJ denied preclearance to plans that, even though not retrogressive to minority voters, nonetheless resulted in discrimination against them (e.g., through dilution, fragmentation, or packing). . . . After the Supreme Court rejected the Attorney General's policy in [*Bossier I*], the DOJ subsequently amended its regulations to abandon the policy. As a result, plans that were free of a racially discriminatory purpose and a retrogressive effect would now have to be precleared even if they diluted minority voting strength under section 2. The DOJ would be forced to preclear the plans and then turn around and file suit against the locale under section 2, challenging the very plan it had just approved.").

Three years later, the Supreme Court heard the case a second time. In its 1999 decision in *Reno v. Bossier Parish School Board* (*Bossier II*) the Court's focus was on determining whether it was proper for the Justice Department to deny preclearance in light of evidence that the rejection of the NAACP-backed school board plan may have been enacted in an effort to suppress the ability of African Americans to elect their candidate of choice to the school board.[64] The majority opinion, written by Justice Scalia, held that the Justice Department was not authorized under Section 5 to prohibit the preclearance of a redistricting plan enacted with a discriminatory but non-retrogressive purpose.[65] Thus, following *Bossier II*, instituted just prior to the 2000 redistricting cycle, the Justice Department was under strict direction from the Supreme Court to only deny preclearance to apportionment plans enacted that were retrogressive in purpose or effect.[66]

After curbing the Justice Department's discretion to review redistricting plans under Section 5 and limiting the review primarily to the issue of retrogression in purpose or effect the Supreme Court imposed additional constraints in its effort to restructure the definition of retrogression in its 2003 decision in *Georgia v. Ashcroft*.[67] Following the 2000 Census, the Justice Department rejected an apportionment plan for the Georgia State Senate, after concluding that the plan had a retrogressive effect on the ability of African Americans to elect their candidates of choice to the state senate.[68] The proposed plan, supported by many elected African American state legislators,[69] "unpacked" many of the state's majority-minority legislative districts, reducing the voting age population in some from over 65% African American to just over 50%, and minimizing the African American population in other districts from just over 50% to 30–40% of the voting age population.[70]

64. 528 U.S. 320 (2000). For a more detailed analysis of *Bossier II*, see, for example, Harper, *supra* note 59, at 655–61.

65. *Bossier II*, 528 U.S. at 341.

66. *See* Harper, *supra* note 59, at 559 ("*Bossier II* lowers the bar for future apportionment plans in that even if a plan is discriminatory, so long as it does not have a retrogressive effect or a retrogressive purpose, it should be precleared. . . . In other words, a pre-*Bossier II* apportionment plan which tried to substantially enhance the voting position of minorities would be discriminatory and thus be denied preclearance. *Bossier II* allows such a plan to be precleared and consequently, enforceable.").

67. 539 U.S. 461 (2003). For a detailed analysis of the *Georgia v. Ashcroft* case, see, for example, Donahue, *supra* note 35, at 1663–66; Karlan, *supra* note 2; Kousser, *supra* note 32, at 737–41; Pitts, *supra* note 49, 290–300.

68. *Ashcroft*, 539 U.S. at 466–67.

69. *Id.* at 471.

70. *Id.* at 470–71.

The Court rejected the Justice Department's conclusion that the plan was retrogressive, concluding that Georgia "likely met its burden of showing non-retrogression" and interpreting Section 5 to allow states the flexibility to reduce the minority voting age population in some majority-minority districts "even if it means that in some of those districts, minority voters will face a somewhat reduced opportunity to elect a candidate of their choice."[71] Under the new *Georgia v. Ashcroft* standard, the Court appears to instruct the Justice Department to consider the intent of the drafters of the plan over the plan's actual effect.[72] Specifically, the Attorney General is instructed to examine whether, in enacting a new districting plan, (1) the local jurisdiction attempted to protect the ability of minority voters to elect their candidate of choice, (2) whether the minority group currently holds an opportunity to participate in the political process, and (3) whether local minority officeholders supported the plan.[73]

Taken collectively, *Beer*, *Bossier I*, *Bossier II*, and *Georgia v. Ashcroft* illustrate the significant, if not predominant, role that the Supreme Court has played since the 1965 passage of Section 5. As others have noted,[74] the opinions illustrate the Court's effort to control and cabin the Justice Department's discretion in administering Section 5. The extent to which, during the 2006 reauthorization process, Congress altered this judicial doctrine is detailed in Part III. But any narrative of the Court's Section 5 jurisprudence and view of the Justice Department's enforcement of the provision must be seen as part and parcel with its view of the application of the Fourteenth Amendment's Equal Protection Clause to race and redistricting during this same

71. *Id.* 489–90. The Court also noted that the plan created more majority-Democrat districts and, based on the reasoning that an elected Democrat was more likely to represent the interests of African American voters than a Republican, the Court reasoned that the legislature's intent in drawing these district lines to increase the number of majority Democrat districts protected the interests of African American voters in Georgia. The Court's opinion emphasized that "a substantial majority of black voters in Georgia" are registered Democrats and noted that numerous African American elected officials in Georgia—all of whom were Democrats—supported the challenged plan. *Id.* at 469.

72. *See also*, Pitts, *supra* note 49, at 300–01 (observing that the Court's opinion in *Ashcroft* "finds as relevant to retrogression, evidence that seems more germane to an analysis of discriminatory purpose rather than discriminatory effect" and "explicitly places value on the motive and purpose of Georgia's legislators when discussing whether the Senate plan meets the new retrogression standard").

73. *Id.*

74. Tokaji, *supra* note 25, at 805–06 ("[T]he two *Bossier* cases, and *Georgia v. Ashcroft* are best understood as an attempt to curb the preclearance power of the DOJ. In the eyes of the Court, at least, the DOJ has overstepped its proper boundaries and needs to be reined in. . . . [The] Court *perceived* the DOJ to have exceeded its authority, and this perception is at least partly responsible for the results and legal doctrines that arise from these cases.").

time period. It is to that area of the Court's jurisprudence that this Part now turns.

B. Race, Districting, and the Constitution, 1965–2000

Prior to its blockbuster opinions in *Shaw v. Reno*,[75] and *Miller v. Johnson*,[76] the Supreme Court had considered constitutional challenges to racial gerrymanders on three separate occasions, striking down only one redistricting plan on the grounds that it violated the Fifteenth Amendment.[77] The U.S. Supreme Court first actively enforced the Fifteenth Amendment of the Constitution in the representation context in *Gomillion v. Lightfoot*,[78] concluding that legislation enacted to redefine the boundaries of Tuskegee, Alabama, had the effect of removing from the city all but four or five of its 400 black voters while not removing a single white voter.[79] The Court ultimately concluded that the redistricting plan would deprive blacks of the benefits of residing in Tuskegee, including the right to vote in municipal elections, and therefore violated the Fifteenth Amendment.[80] The Court considered another constitutional challenge to an apportionment plan a few years later in *Wright v. Rockefeller*.[81] At issue in *Wright* was a New York state congressional districting plan, in which plaintiffs alleged the plan's districts segregated voters on the basis of race in violation of the Fourteenth and Fifteenth Amendments.[82] The Court rejected this argument and ultimately upheld the plan, notwithstanding Justice Douglas' strongly worded dissent,[83] which articulated the concern that voters' race and ethnicity may have played too large a role in the drawing of district lines.[84]

The Court issued its next opinion on racial gerrymandering and the Constitution in 1977 in *United Jewish Organizations of Williamsburgh, Inc. v. Carey* (*UJO*).[85] At issue in *UJO* was whether New York's use of racial criteria in attempting to comply with Section 5 of the Voting Rights Act violated the Fourteenth or Fifteenth Amend-

75. 509 U.S. 630 (1993).
76. 515 U.S. 900 (1995).
77. U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").
78. 364 U.S. 339 (1960).
79. *Id.* at 341.
80. *Id.*
81. 376 U.S. 52 (1964).
82. *Id.* at 53–54.
83. *Id.* at 59 (Douglas, J., dissenting).
84. *Id.* at 67 ("When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist.").
85. 430 U.S. 144 (1977).

ments of the Constitution.[86] The Court reviewed the redistricting plan, which after some consultation with the Justice Department that led to the resubmission of a revised plan, split the Hasidic Jewish community into two districts where nonwhite voters were the majority.[87] Plaintiffs, representatives of the Hasidic Jewish community, challenged the plan as a violation of the Fourteenth Amendment, claiming that the revised plan diluted the value of their votes in order to achieve a racial quota and assigned them to districts solely on the basis of race.[88] The Court rejected the plaintiff's argument, concluding that "neither the Fourteenth nor the Fifteenth Amendment mandates any per se rule against using racial factors in districting and apportionment."[89]

The Court's jurisprudence around the constitutionally permissible use of race in redistricting remained stagnant and unchanged for fifteen years following the *UJO* decision, until the Court was presented with an apportionment conundrum out of North Carolina in the case that would become *Shaw v. Reno*.[90]

1. Shaw v. Reno *and the Equal Protection Clause*

The Decennial Census Report of 1990 indicated that an influx of new residents into North Carolina earned the State an additional seat in the U.S. House of Representatives.[91] As a result, the North Carolina General Assembly enacted legislation in July 1991 to divide the State into twelve congressional districts.[92] The plan included one "majority-minority" district where the majority voting age population was African American.[93]

Because forty of the State's one hundred counties were subject to preclearance under Section 5 of the Voting Rights Act, the state legislature was required to seek approval from the Attorney General or the

86. *Id.* at 148.

87. *Id.* at 152.

88. *Id.* at 152–53. For further discussion on the *UJO* case, see Scott E. Blissman, *Navigating the Political Thicket: The Supreme Court, The Department Of Justice, And The "Predominant Motive" In District Apportionment Cases After* Miller v. Johnson, 5 WIDENER J. PUB. L. 503, 517–19 (1996).

89. *UJO*, 430 U.S. at 161.

90. 509 U.S. 630 (1993).

91. *Id.* at 633. For further background into the demographics and legislative considerations in the 1990 redistricting process in North Carolina, see, for example, Thomas C. Goldstein, *Unpacking and Applying* Shaw v. Reno, 43 AM. U.L. REV. 1135, 1147–51 (1996) (describing the demographics of the state and pressure from the Democrat-led legislature to design districts that included a majority of Democratic voters and also adhere to the one person, one vote requirement that each district have equal populations).

92. *Shaw*, 509 U.S. at 633–35.

93. *Id.* at 633.

District Court for the District of Columbia.[94] In December 1991, the United States Attorney General, acting on behalf of the Justice Department, issued a formal objection to North Carolina's congressional reapportionment plan on the grounds that the State legislature was obligated under Section 5 to create a second majority-minority district comprised of Native American and African American citizens in the south-central to southeastern part of the state.[95] Notably, the Justice Department's rejection of the original North Carolina plan did not rest on a finding of retrogression—indeed, the "benchmark" districting plan enacted following the 1980 Census had not contained any majority-minority districts and therefore a plan with one such district could only be deemed an improvement. In its letter to the State and in its brief before the U.S. Supreme Court, the Justice Department, as it often did prior to the Supreme Court's dual holdings in *Bossier Parish*,[96] instead appeared to have denied preclearance based on a requirement under Section 2 of the Voting Rights Act that the State create the most majority-minority districts possible given the State's demographics and geography,[97] or based on a finding that North Carolina acted with a discriminatory purpose in rejecting a proposed second majority-minority district.[98]

North Carolina responded to the Justice Department's rejection by revising its congressional districting plan to create a second majority-minority district—not in the southern part of the State as suggested by the Justice Department, but in the north-central region along Interstate 85.[99] The new District 12 passed through ten counties, and

94. *Id.* at 634. *See also supra* text accompanying notes 31–37.

95. *Shaw*, 509 U.S. at 635. *See also* James F. Blumstein, *Racial Gerrymandering And Vote Dilution:* Shaw v. Reno *In Doctrinal Context,* 26 RUTGERS L. J. 517, 525 (1995) ("In its letter denying approval of the North Carolina plan, the Justice Department identified ways in which North Carolina could have added a second majority-black district, consistent with traditional districting principles.").

96. *See supra* text accompanying notes 59–66.

97. *See* Timothy G. O'Rourke, Shaw v. Reno*: The Shape of Things to Come*, 26 RUTGERS L. J. 723, 749–50 (1995) (emphasizing that the original North Carolina plan was "plainly nonretrogressive" but that the Justice Department's rejection of the plan "clearly signaled to the State that the Justice Department wanted a plan that created two majority black districts, an outcome presumably required by Section 2; nonretrogression would not do. After the 1991 objection, then, the state's principal concern remained Section 5 preclearance, but preclearance took on the coloration of Section 2.").

98. Blumstein, *supra* note 95, at 525–27. *See also* Robinson O. Everett, *Redistricting In North Carolina—A Personal Perspective*, 79 N.C. L. REV. 1301, 1306–07 (2001) ("[D]uring this period the Department of Justice employed with increasing vigor its preclearance authority to deny approval of changes in voting procedures and qualifications. In many instances, the state or political subdivision involved would accede to the demands of the civil rights division in order to avoid delay and litigation expenses.").

99. *Shaw*, 509 U.S. at 635.

was described as a "thin band, sometimes no wider than Interstate Highway 85, some 160 miles long, snaking diagonally across piedmont North Carolina from Durham to Gastonia."[100] Justice O'Connor would later cite, in her majority opinion in *Shaw*, to a comment from North Carolina State Representative Mickey Michaux that "[i]f you drove down the interstate with both car doors open, you'd kill most of the people in the district."[101] In the words of other observers, the other majority-minority district, District 1, conjured up images of a "bug splattered on a windshield" or a "Rorschach ink-blot test."[102]

The Justice Department approved the second plan under Section 5,[103] setting the stage for a challenge to the plan's constitutionality. A group of five white plaintiffs brought suit against the North Carolina General Assembly and the U.S. Attorney General in a North Carolina federal district court.[104] Plaintiffs alleged that in creating the two majority-minority districts, the State had placed too great a consideration on the racial demographics and disregarded traditional districting principles such as "compactness, contiguousness, geographical boundaries, or political subdivisions"[105] in violation of the Fifteenth Amendment and the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. According to the complaint, the Justice Department's enforcement of Section 5 had the effect of "coercing [North Carolina] into adopting and implementing an unconstitutional plan of redistricting."[106]

The district court rejected their claims, concluding that because the plaintiffs were white, the plan could only violate their rights if it was "adopted with the purpose and effect of discriminating against white voters . . . on account of their race."[107] Because the State's purpose in creating the second majority-minority district was to comply with the Voting Rights Act—and as proportional underrepresentation of white voters did not result from the plan—the district court concluded no claim was stated and dismissed the case.[108] The plaintiffs appealed to the U.S. Supreme Court, which noted probable jurisdiction.

---

100. Shaw v. Barr, 808 F. Supp. 461, 464 (E.D.N.C. 1992).

101. *Shaw*, 509 U.S. at 636.

102. *Id.* at 635.

103. *Id.* at 636.

104. Shaw v. Barr, 808 F. Supp. at 462–63.

105. *Shaw*, 509 U.S. at 637.

106. Shaw v. Barr, 808 F. Supp. at 465.

107. *Shaw*, 509 U.S. at 638 (citing Shaw v. Barr, 808 F. Supp. at 472). For further discussion of the District Court's decision, see Tricia Ann Martinez, *When Appearance Matters: Reapportionment Under the Voting Rights Act and* Shaw v. Reno, 54 LA. L. REV. 1335, 1342–43 (1994).

108. *Shaw*, 509 U.S. at 638–39.

The Court's opinion in *Shaw v. Reno*,[109] authored by Justice O'Connor and joined by four other Justices, concluded that a citizen in a racially gerrymandered district could state a claim under the Fourteenth Amendment if they could feasibly allege that traditional districting principles, such as respect for political subdivisions, compactness, and contiguity, had been set aside in deference to considerations of the racial makeup of the district.[110] Most notably, the opinion expressed great concern over the shape of the districts in North Carolina's plan, referring to them as "dramatically irregular"[111] and "bizarre."[112] O'Connor emphasized the importance of appearance in redistricting, pontificating that when "redistricting legislation . . . is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles," the legislation could violate the Equal Protection Clause of the Fourteenth Amendment.[113] Under *Shaw*, such legislation would be subjected to strict scrutiny, surviving judicial review only if the state could show a compelling interest in the plan, and that the consideration of racial demographics when drawing the plan was narrowly tailored to advance that interest.[114]

O'Connor's opinion in *Shaw* did not reach a conclusion regarding the constitutionality of the North Carolina redistricting plan, which was not the same plan that was at issue in *Shaw*. The Supreme Court subsequently determined that compliance with the Voting Rights Act constituted a sufficiently compelling governmental interest to withstand strict scrutiny, and held that the State of North Carolina was

109. 509 U.S. 630 (1993). For a detailed analysis of *Shaw v. Reno* and its implications, see, for example, Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," And Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 494–97 (1993).

110. *See Shaw*, 509 U.S. at 658 ("Today we hold only that appellants have stated a claim under the Equal Protection Clause by alleging that the North Carolina General Assembly adopted a reapportionment scheme so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race, and that the separation lacks sufficient justification.").

111. *Id.* at 633.

112. *Id.* at 644.

113. *Id.* at 642. Justice O'Connor also emphasized her "belie[f] that reapportionment is one area in which appearances do matter. A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions . . . as impermissible racial stereotypes." *Id.* at 647.

114. *Id.*

therefore justified in considering race in drawing its voting district lines.[115]

Shaw was nevertheless groundbreaking because it created a new, "analytically distinct" cause of action under the Equal Protection Clause.[116] After *Shaw*, any plaintiff living in a gerrymandered district could allege that an apportionment plan, though facially neutral, violated the Equal Protection Clause where it rationally could not be understood as anything other than an effort to separate voters into different districts on the basis of race without sufficient justification. The opinion simultaneously led to a significant rise in challenges to various apportionment plans[117] due to confusion over how to apply its "appearances are suspect" standard,[118] and concerns that this new legal cause of action, by threatening the use of racial considerations in redistricting, would "undo the most significant vehicle to date for bringing heretofore excluded minorities into the halls of elective politics."[119]

---

115. Hunt v. Cromartie, 526 U.S. 541 (1999).

116. *Shaw*, 509 U.S. at 652 ("Nothing . . . precludes white voters (or voters of any other race) from bringing the analytically distinct claim that a reapportionment plan rationally cannot be understood as anything other than an effort to segregate citizens into separate voting districts on the basis of race without sufficient justification.").

117. Esteemed election law scholar Pamela Karlan subsequently remarked that "the Supreme Court had no real idea when it decided *Shaw* about the level of litigation that it was going to have to see over the next couple of years. It has six cases that will be up there by the end of this year, and that doesn't even count the likelihood that there will be additional cases brought up as people start to try to apply *Shaw* to districting for state legislatures or local bodies." Pamela S. Karlan, *Conference: The Supreme Court, Racial Politics, And The Right To Vote:* Shaw v. Reno *And The Future Of The Voting Rights Act*, 44 AM. U.L. REV. 1, 3 (1994–95). *See also id.* (predicting that the Supreme Court would "try and move back somewhat from *Shaw*, at least to cut down on the amount of litigation").

118. Andrea Bierstein, *Millennium Approaches: The Future of the Voting Rights Act After* Shaw, DeGrandy, *and* Holder, 46 HASTINGS L.J. 1457, 1510–11 (1995) ("If it is impermissible to assign voters to districts on the basis of their race, why should it matter how the district to which they are assigned is shaped? Or put the other way, if it is permissible, indeed desirable, to assign voters to districts on the basis of their race . . . how can it become impermissible to do so when the district to which they are assigned is irregularly-shaped?").

119. Samuel Issacharoff, *Racial Gerrymandering In A Complex World: A Reply To Judge Sentelle*, 45 CATH. U.L. REV. 1257, 1262 (1996) ("There is no escaping the fact that the consequences of [*Shaw*], without altering any other facet of how representative elections are held, threatens to undo the most significant vehicle to date for bringing heretofore excluded minorities into the halls of elective politics. . . . I will simply reiterate now, that we have come too far to allow legislative bodies lacking meaningful minority representation to claim political legitimacy. Despite the aspirations for the day that race can be put behind us . . . [w]e have to face the fact that some form of racial politics and thus some need for race-conscious representation devices is here to stay, at least for the foreseeable future. The only real question is how to achieve fairness in the present while struggling for justice in the future.").

*2. The Post-*Shaw *Deluge:* Miller v. Johnson

In the years immediately following the Court's decision in *Shaw*, federal district courts in several Section 5 covered states, including Georgia, Louisiana, North Carolina, and Texas, heard "*Shaw*-based attacks of congressional districts"[120] based on their post-1990 Census reapportionment legislation.[121] Inevitably, the Supreme Court recognized the need to clarify its holding in *Shaw* and did so just four short years later in *Miller v. Johnson*.[122]

In *Miller*, the Court again considered the extent to which racial demographics could be considered in redistricting decisions. As was the case in *Shaw*, the State of Georgia also gained a seat in the United States House of Representatives following the 1990 Census.[123] While African Americans comprised nearly a third of the State's population prior to 1990, only one district, District 5, had a majority of African American voters.[124] Accordingly, the Georgia General Assembly adopted redistricting guidelines that "required single-member districts of equal population, contiguous geography, nondilution of minority voting strength, fidelity to precinct lines where possible, and compliance with [Sections] 2 and 5 of the [Voting Rights] Act."[125] The Assembly submitted the resulting Congressional apportionment plan to the Justice Department for preclearance on October 1, 1991.[126] The plan included two majority-minority districts, increasing the number of Congressional districts in the state with a majority of African American voting age population from one to two.[127] The Justice Depart-

120. O'Rourke, *supra* note 97, at 743.

121. Note, Miller v. Johnson*: The Supreme Court Eases The Burden of Proving Racial Gerrymandering*, 27 LOY. U. CHI. L.J. 97, 98 (1995) (describing "at least seven states" that saw challenges to congressional redistricting plans following *Shaw*).

122. 515 U.S. 900 (1995).

123. Johnson v. Miller, 864 F. Supp. 1354, 1360 (S.D. Ga. 1994), *aff'd* 515 U.S. 900 (1995). For a full description of the dance between the Justice Department and the Georgia Assembly leading up to the *Miller* opinion, see generally Laughlin McDonald, *Can Minority Voting Rights Survive* Miller v. Johnson*?*, 1 MICH. J. RACE & L. 119, 123–30 (1996) (written by the Director of the ACLU's Southern Regional Office in Atlanta, Georgia).

124. McDonald, *supra* note 123, at 120. District 5 was also the only district represented by an African American, civil rights icon John Lewis. *Id.*

125. *Miller*, 515 U.S. at 906.

126. *Id.*

127. *Johnson*, 864 F. Supp. at 1363. McDonald, *supra* note 123, at 127 ("The plan contained two majority-minority districts (the Fifth, 57.8% Black VAP, and the Eleventh, 56.6% Black VAP), and a third district, the Second with 35.4% Black VAP. . . . The Attorney General objected to the plan on January 21, 1992 on the grounds that: 'elections in the State of Georgia are characterized by a pattern of racially polarized voting'; 'the Georgia legislative leadership was predisposed to limit black voting potential to two black majority districts'; the leadership did not make a good faith attempt to 'recognize the black voting potential of the large concentration of minorities in southwest Georgia'; and, the State had provided

ment denied preclearance of this plan, arguing that the Assembly could have drawn one additional majority African American district and criticizing the plan's general failure to "'recognize' concentrations of [African Americans] in the south-west region of the state."[128]

The Georgia Assembly then created and submitted a second plan that increased the black population in Districts 2, 5, and 11, preserving the two majority-African American districts and creating a third district, District 11, where African Americans comprised 45% of the voting eligible population.[129] The Justice Department rejected this plan as well, noting that Georgia again failed to create a third majority-minority district, despite the availability of alternative plans drafted by the American Civil Liberties Union that created a third majority-minority district by moving several densely populated black areas into other districts.[130] In response, the Georgia Assembly devised and submitted a third plan[131] that made District 11 a solidly African American majority district that included parts of Atlanta, Savannah, and outlying areas, creating a district that spanned 200 miles and connecting, according to a federal district court that later reviewed the plan, four major population centers that "have absolutely nothing to do with each other."[132] The Justice Department approved the third plan in April 1992,[133] and voters in District 11 subsequently sent African American Cynthia McKinney to Congress.[134]

The individual who McKinney beat in the race to represent District 11, George DeLoach, joined with residents of the District to challenge the constitutionality of the apportionment plan.[135] A three judge panel concluded that District 11 was unconstitutional under the Supreme Court's holding in *Shaw*, finding that the racial makeup of the district was "the predominant, overriding factor explaining [Georgia's] decision to attach to the Eleventh District various appendages containing dense majority-Black populations."[136] As a result the district would need to be justified by a compelling state interest, and be nar-

---

only pretextual reasons for failing to include in the Eleventh District the minority population in Baldwin County.").

128. *Johnson*, 864 F. Supp. at 1364.

129. *Id.*

130. *Miller*, 515 U.S. at 907. Under this plan the Macon area moved to the Second District from the Eleventh and the Savannah area moved into the Eleventh District to compensate for the loss of black population. *Id.*

131. *Johnson*, 864 F. Supp. at 1366. The third plan was passed by the General Assembly by just one vote. The Speaker's vote was decisive, and according to his testimony, the only reason he voted for it was to "keep the courts from doing it." *Id.*

132. *Miller*, 515 U.S. at 908.

133. *Id.* at 909.

134. *Johnson*, 864 F. Supp. at 1369.

135. *Id.* at 1354.

136. *Miller*, 515 U.S. at 918.

rowly tailored to further that interest, to withstand strict scrutiny.[137] Notably, the district court assumed that compliance with the Voting Rights Act could be a compelling interest sufficient to justify the use of race in drawing district lines[138] but concluded that it was not the Voting Rights Act, but the Justice Department's interpretation of the law, that led to the requirement of a third majority-African American district in Georgia.[139] But despite some evidence that Georgia's apportionment plan was drawn to protect against minority vote dilution,[140] the district court concluded that the State's "true interest" in drawing District 11 to be a majority-African American district was to comply with the Justice Department's "policy of maximizing majority-Black districts."[141] This interest, the district court concluded, was not sufficiently compelling to withstand the strict scrutiny analysis.[142]

The U.S. Supreme Court took the case and, in a five to four decision, upheld the district court's determination that Georgia's apportionment plan and the decisions surrounding its enactment violated the Equal Protection Clause.[143] Justice Kennedy delivered the majority opinion in *Miller v. Johnson*.[144] Like the district court, Kennedy's opinion applied strict scrutiny in reviewing the redistricting plan, not because plaintiffs had proven that the district was bizarrely shaped, a la *Shaw*, but based on evidence that race was the "predominant" factor behind the Georgia legislature's decision to place a certain geo-

137. *Id.* at 920.

138. *Johnson*, 864 F. Supp. at 1373.

139. *Miller*, 515 U.S. at 917–18.

140. Laughlin McDonald, attorney for the ACLU of Georgia who was involved in the case, later explained that "Georgia, however, refused to argue directly that it had a compelling interest in drawing the Eleventh District as a majority-Black district to eradicate the effects of past discrimination or to avoid a section 2 violation. The State was involved in other voting rights litigation and did not want to make admissions in *Miller* that might damage its position in the other cases. . . . [Nevertheless,] the State had a 'true interest,' which it announced at the very beginning of the redistricting process, in creating the district as majority Black to avoid minority vote dilution. The State's decision not to argue that it had a compelling interest in eradicating the effects of past discrimination or in complying with section 2 was made by its lawyers as a matter of litigation strategy. A majority of the Court erroneously conflated this post hoc legal posturing with the State's real and admitted interest in not diluting minority voting strength." McDonald, *supra* note 123, at 130–31.

141. *Miller*, 515 U.S. at 942.

142. *Johnson*, 864 F. Supp. at 1393. *See also* Dale Price, *Voting Rights vs. Equal Protection: The Continuing Battle in the Context of Redistricting*, 74 U. DET. MERCY L. REV. 261, 273 (1997) (describing the ACLU's "'hijacking'" of Georgia's redistricting process in an effort to create a third majority-black district, and emphasizing the district court's view that the Justice Department was "'more accessible—and amenable to the opinions of the ACLU'" than to state authorities).

143. *Miller*, 515 U.S. at 920.

144. *Id.* at 903.

graphic area within a particular district.[145] Notably, Kennedy emphasized the general permissibility of considering racial demographics, calling on courts to be "sensitive to the complex interplay of forces that enter a legislature's redistricting calculus" by acknowledging that "legislatures will . . . almost always be aware of racial demographics."[146] Strict scrutiny of a plan, Kennedy concluded, is triggered when a plaintiff presents evidence that the legislature was predominantly motivated by race in creating its apportionment plan.[147]

After concluding that race was the "predominant factor" motivating the legislature in drawing, and re-drawing, its apportionment plan, Kennedy's opinion indicated that a plan would withstand strict scrutiny if the State could "demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest."[148] Georgia's plan, however, did not survive this test. The Court noted that the Georgia legislature created the third majority-African American district solely in compliance with the Justice Department's enforcement of the preclearance requirements under Section 5 of the Voting Rights Act.[149] While the Court acknowledged that compliance with Section 5 may provide that compelling interest generally,[150] the State's compliance with the Justice Department's interpretation and application of Section 5 was insufficient to justify the use of race in drawing the district lines.[151] In other words, Kennedy's opinion ruled that the Justice Department's rejections of the first two plans that Georgia enacted was improper because it compelled legislative efforts not reasonably necessary/narrowly tailored to the written dictates of the Voting Rights Act.[152] In the view of the lower court, Kennedy noted, the Justice Department's application "expanded" Section 5 beyond what

145. *Id.* at 920.

146. *Id.* at 915–16.

147. *Id.* at 920. For an in-depth discussion of Justice Kennedy's emphasis on legislative intent in developing the "predominant factor" trigger, see Richard Briffault, *Race and Representation After* Miller v. Johnson, 1995 U. CHI. LEGAL F. 23, 45–51 (1995).

148. *Miller*, 515 U.S. at 920.

149. *Id.* at 920–21.

150. *Id.* at 921. The Court stated that regardless of "whether or not in some cases compliance with the [substantive requirements of Section 5 of the Voting Rights] Act, standing alone, can provide a compelling interest independent of any interest in remedying past discrimination, it cannot do so here." *Id. See also* Clark v. Calhoun County, Miss., 88 F.3d 1393 (5th Cir. 1996) (holding that Calhoun County, Mississippi's 1990 redistricting plan violated the Voting Rights Act but interpreting *Miller* to find that compliance with the Voting Rights Act was a compelling interest).

151. *Miller*, 515 U.S. at 921–22.

152. *Id.* at 921–24.

Congress intended.[153] Georgia, the Court concluded, could therefore not cite to their efforts to comply with the Justice Department's "maximization" definition of Section 5 as a "compelling interest" sufficient to justify using race as a predominant motive in drafting their redistricting plan.[154]

Kennedy's opinion in *Miller* is notable for how critical it was of the Justice Department's use of its preclearance power under Section 5 to require a maximization of the number of majority-African American districts in a plan.[155] In particular, the *Miller* opinion scorned the Justice Department's "use of partisan advocates" in reviewing the State's plans and its "close cooperation with the ACLU's vigorous advocacy of minority district maximization."[156] The Court further accused the Justice Department, in requiring districting plans that maximize the number of majority-minority districts,[157] of using the Voting Rights Act "to demand the very racial stereotyping the Fourteenth Amendment forbids."[158]

3. *The Post* Miller *and* Shaw *Deluge: The Constitution, Redistricting, and the Mid- to Late-1990s*

Following *Miller*, several additional constitutional challenges to redistricting plans began to emerge.[159] Three significant cases made it to the Supreme Court: *Bush v. Vera*,[160] challenging the Texas congressional redistricting plan; *Shaw v. Hunt*,[161] a continuation of the challenges to the North Carolina congressional redistricting that went forward after *Shaw v. Reno*;[162] and *Easley v. Cromartie*,[163] a challenge to the congressional redistricting plan that North Carolina en-

153. *Id.* at 925 (concluding that "[i]n utilizing [Section] 5 to require States to create majority-minority districts wherever possible, the Department of Justice expanded its authority under the statute beyond what Congress intended and we have upheld").
154. *Id.* at 925–27.
155. *Id.* at 924–25 (noting that the Justice Department "did adopt a maximization policy and followed it in objecting to Georgia's first two plans"). *See also* Blissman, *supra* note 88, at 541; McDonald, *supra* note 123, at 157–59.
156. *Miller*, 515 U.S. at 909.
157. *Id.* at 917 (citing the district court's conclusion that "'it became obvious . . . that [the Justice Department] would accept nothing less than abject surrender to its maximization agenda'").
158. *Id.* at 928.
159. *See* Issacharoff, *supra* note 119, at 1265 (noting "[w]e are now six years into the decennial redistricting cycle and the avenues of exit for the courts are nowhere readily apparent," and lamenting the "real institutional costs" of the "several" redistricting challenges "forming a queue for further Court review").
160. 517 U.S. 952 (1996) (challenging the constitutionality of Texas' 1990 congressional redistricting plan).
161. 517 U.S. 899 (1996).
162. 509 U.S. 630 (1993).
163. 532 U.S. 234 (2001).

acted to comply with the Court's holding in *Shaw v. Reno* and *Shaw v. Hunt*.

In *Bush v. Vera*, Justice O'Conner reaffirmed and clarified Kennedy's holding in *Miller*, finding that where "traditional districting criteria" is neglected or subordinated "to the use of race for its own sake," the Court must strictly scrutinize a redistricting plan.[164] Notably, Justice O'Connor also asserted that "strict scrutiny does not apply merely because redistricting is performed with consciousness of race. Nor . . . to all cases of intentional creation of majority-minority districts . . . . For strict scrutiny to apply, . . . race must be the predominant factor motivating the legislature's [redistricting] decision."[165] In the view of the *Vera* court, however, Texas went well beyond what was necessary to comply with the mandates of Section 5. The Court ultimately held that Texas had used race as a proxy for legitimate districting principles by utilizing a computer program that provided up-to-the-minute racial and economic statistics for each districting change.[166] Based on the State's reliance on the REDAPPL computer program and the use of other racial considerations, the Court concluded that race was the predominant motivating factor.[167] Applying strict scrutiny, Justice O'Connor rejected arguments that the plan was narrowly tailored because of its bizarre shape.[168] And while the Court in *Vera* "assumed without deciding" that a state may have a compelling interest in complying with the requirements of the Voting Rights Act[169]—so long as Section 5 is not applied to require the maximization of majority-minority districts[170]—O'Connor also stated in a separate concurring opinion that "the States have a compelling interest in complying with the [Voting Rights Act]."[171]

Justice Rehnquist's majority opinion in *Shaw v. Hunt*,[172] joined by Justices O'Connor, Kennedy, Scalia and Thomas, briefly reviewed and found sufficient evidence that race was the overriding and predominant factor behind North Carolina's redistricting plan that was at the center of *Shaw v. Reno*.[173] The Court's opinion primarily focused on whether North Carolina had a compelling interest in its predominant use of race.[174] As in *Miller* and *Vera*, the Court rejected the redistrict-

164. 517 U.S. at 993.
165. *Id.* at 958–59.
166. *Id.* at 961.
167. *Id.* at 961–63.
168. *Id.* at 964–65.
169. *Id.* at 990 (O'Connor, J., concurring) (noting that in order to be narrowly tailored to this compelling interest, the districting plan would have to comply with the *Gingles* test, and also adhere to traditional redistricting principles).
170. *Id.* at 991.
171. *Id.* at 992.
172. 517 U.S. 899 (1996).
173. *Id.*
174. *Id.* at 905.

ing plan, emphasizing that "a map portrays the districts' deviance far better than words," and that the district lines were "unconventional" under any standards.[175] Justice Rehnquist also concluded that the challenged districts were "not required under a correct reading of [Section] 5."[176]

Following the rejection of its districts in *Shaw v. Hunt*, the North Carolina legislature redrew its districts a fourth time in 1997. That apportionment plan was also challenged as unconstitutional, resulting in the Supreme Court's 2001 decision in *Easley v. Cromartie*.[177] In *Easley*, the Court upheld District 12, a near majority-minority district where 47% of the district's voting age population was African American.[178] Alleging the North Carolina General Assembly impermissibly utilized race as the "predominant factor" in redistricting, plaintiffs once again challenged the plan as unconstitutional.[179] Overturning a district court ruling that found for the plaintiffs, Justice Breyer, writing for a five-justice majority, held that it was permissible for a state to consider race if that consideration was a proxy for partisanship.[180] Breyer explained that a "legislature may, by placing reliable Democratic precincts within a district without regard to race, end up with a district containing more heavily African-American precincts, but the reasons would be political rather than racial."[181]

The collateral effect of the post-*Miller* decisions in *Vera, Hunt,* and *Cromartie* was to create a constitutional doctrine where bizarrely shaped districts that are drawn to capture or exclude voters based on their race will likely violate the Fourteenth Amendment, but districts created in the service of the two-party system that are coincidentally majority-African American are permissible. The cases also left open an additional question, explicitly raised again by Justice Kennedy in *Georgia v. Ashcroft*,[182] of whether compliance with the Justice Department's application or interpretation of Section 5 would lead covered states and jurisdictions to violate the constitutional doctrine spelled out in *Shaw, Miller*, and their progeny.[183] The *Bossier Parish* cases addressed this issue somewhat, in explicitly limiting Section 5

175. *Id.* at 902.
176. *Id.* at 911.
177. 532 U.S. 234 (2001).
178. *Id.* at 240.
179. *Id.* at 237.
180. *Id.* at 246.
181. *Id.* at 245.
182. 539 U.S. 461 (2003). *See also supra* text accompanying notes 67–73.
183. *But see* Tokaji, *supra* note 25, at 802–03 ("It is unlikely that any definitive resolution can be reached as to the motivations of DOJ—either career staff or political appointees—during the post-1990 redistricting. What is clear is that the Supreme Court perceived the DOJ to have a policy of maximizing majority-minority districts, and this perception led to major doctrinal shifts. . . . The Supreme Court's opinions in both areas strongly suggest that distrust of the manner in

preclearance review to lead only to the rejection of actions that were retrogressive in purpose or effect.[184] But even prior to the *Bossier Parish* decisions, the constitutional cases indicate that compliance with Section 5 may in fact be a compelling state interest sufficient to justify the use of race in congressional redistricting.[185] The Court in *Miller* was not concerned that Section 5's nondiscrimination requirement itself conflicts with the Fourteenth Amendment, but instead criticized the Justice Department's "maximization" application of Section 5 that, in the view of the court, went beyond what the statute required.[186] Thus, as commentators have noted, it is not Section 5 per se that compelled unconstitutional behavior, but the Justice Department's efforts throughout the 1990s to, in the words of one commentator, "hijack" and "transmogrif[y]" the text of Section 5 beyond what Congress intended.[187]

These cases each laid the constitutional ground rules for redistricting commissions charged with redrawing apportionment plans following the 2000 U.S. Census. Predictably, plaintiffs began filing complaints with federal courts to review redistricting plans crafted after the 2000 census with an eye towards determining whether district shape and demographics, evidence of legislative intent, and the Justice Departments "expansive" interpretation of Section 5 would lead to the enactment of additional unconstitutional apportionment plans. It is to a review of these post-2000 redistricting cases that this Article now turns.

III. SECTION 5, THE CONSTITUTION, AND REDISTRICTING FOLLOWING THE 2000 CENSUS

Immediately following the *Shaw* decision in 1994, courts in several states were forced to deal with multiple constitutional challenges to state and congressional apportionment plans under the doctrine, al-

---

which the DOJ was exercising its preclearance power influenced the Court's decision making.").

184. *See also supra* text accompanying notes 59–66. *See also* Donahue, *supra* note 35, at 1660–62 ("Taken together, the two *Bossier Parish* decisions fundamentally altered the substantive standards of section 5 review. Not only is the Justice Department required to find actual discriminatory effect or purpose[,] . . . its inquiry on both counts must be limited to the question of retrogression. . . . [A]fter *Bossier Parish II* . . . section 5 could be accurately described not as 'the goddamnedest toughest' attempt to prevent continuing discrimination against minority voters, but rather as solely a ban on 'backsliding.'").

185. *See, e.g.*, Bush v. Vera, 517 U.S. 952, 983 (1996); Shaw v. Hunt, 517 U.S. 899, 911 (1996).

186. Miller v. Johnson, 515 U.S. 900 (1995). *See also* Erickson, *supra* note 50, at 420 (noting that *Miller v. Johnson* represents a trend toward condemning attempts at strict compliance with Justice Department preclearance demands).

187. *See* Craig Haller, *E Pluribus Pluribus: The Hijacking of the Voting Rights Act and the Resegregation of America*, 39 DUQ. L. REV. 619, 621–22 (2001).

leging that race was a significant factor in districting decisions.[188] With *Miller*,[189] *Shaw v. Hunt*,[190] and *Bush v. Vera*,[191] the U.S. Supreme Court struck down plans in Georgia, North Carolina, and Texas, respectively. Though some plans withstood the challenges,[192] the vast majority of cases led to the rejection of plans in states such as Alabama,[193] Virginia,[194] Florida,[195] New York,[196] Louisiana,[197] and South Carolina.[198] This rash of cases amplified concerns that race was often too great a consideration in redistricting decisions, fueling the debate over whether compliance with Justice Department's enforcement of Section 5 of the Voting Rights Act compelled state redistricters to violate the Constitution in order to create as many majority-minority districts as possible.[199]

By the time the 2000 U.S. Census triggered the next round of redistricting, many legal commentators, scholars, and others who followed the saga expected a similar deluge of court decisions finding *Shaw* violations in areas where states were required to comply with Section 5. And indeed, many cases were filed against several redistricting schemes in those states, and many alleged that legislatures violated the *Shaw* and *Miller* equal protection doctrine banning racial gerrymandering in drawing their district lines.[200]

But as the following review of the claims reveals, in each state subject to Section 5 preclearance there was not one single case in which a federal court found that a districting plan drawn after the 2000 Cen-

188. *See* Hebert, *supra* note 47, at 454 (calling the *Shaw* doctrine "a powerful tool in the redistricting wars of the mid- and late-1990s").
189. 515 U.S. 900 (1995).
190. 517 U.S. 899 (1996).
191. 517 U.S. 952 (1996).
192. *See* King v. Illinois Bd. of Elections, 519 U.S. 978 (1996) (mem.), summarily vacating and remanding King v. State Bd. of Elections, 979 F. Supp. 582 (N.D. Ill. 1996) (upholding the constitutionality of a majority-Hispanic district in Illinois); DeWitt v. Wilson, 856 F. Supp. 1409 (E.D. Cal. 1994) (upholding congressional districts against *Shaw* challenge), *aff'd.*, 515 U.S. 1170 (1995).
193. Kelley v. Bennett, 96 F. Supp. 2d 1301 (M.D. Ala. 2000).
194. Moon v. Meadows, 952 F. Supp. 1141 (E.D. Va. 1997).
195. *See* Johnson v. Mortham, 926 F. Supp. 1460 (N.D. Fla. 1996).
196. *See* Diaz v. Silver, 978 F. Supp 96 (E.D.N.Y. 1997) (per curiam).
197. Hays v. State of Louisiana, 936 F. Supp. 360 (W.D. La. 1996) (per curiam), *appeals dismissed as moot*, 518 U.S. 1014 (1996).
198. Smith v. Beasley, 946 F. Supp. 1174 (D.S.C. 1996).
199. *See, e.g.*, Katharine Inglis Butler, *Redistricting in a Post-*Shaw *Era: A Small Treatise Accompanied By Districting Guidelines For Legislators, Litigants, and Courts*, 36 U. RICH. L. REV. 137, 141–43 (2002) (discussing the pressures on complying with *Shaw* and the Voting Rights Act in the 1990s).
200. In addition, as the subsequent analysis details, many plans were also challenged on the grounds that districts were malapportioned, in violation of the one person, one vote principle of *Reynolds*, and others involved claims that a plan violated Section 2 of the Voting Rights Act, or constituted an unconstitutional political gerrymandering.

sus violated the *Shaw/Miller* doctrine. There was therefore no instance in the post-2000 redistricting cycle in which any plan drawn to comply with Section 5 was found to be unconstitutional under *Shaw* or *Miller*. States instead had internalized the lessons of *Shaw* and *Miller* and had reached full compliance with the doctrine in the decade following the decisions. And as a result, the fear that compliance with Section 5 required the Justice Department to encourage or direct "unconstitutional conduct" in drawing district lines was, quite simply, never realized.

A. Redistricting Litigation in the Big Three: Georgia, North Carolina, and Texas

Litigation emerging out of Georgia, North Carolina, and Texas during the 1990s formed the basis of the development of the *Shaw/Miller* jurisprudence. From North Carolina's irregularly shaped districts to Georgia's problematic dance with the Justice Department, these three states were the biggest offenders of the racial gerrymandering principles. One might expect the apportionment plans in these states during the 2000 round of redistricting to be just as problematic, continually pushing the boundaries of permissible use of race and possibly leading to additional violations of the *Shaw/Miller* doctrine. Yet a review of the cases challenging redistricting decisions made after 2000 reveals that the legislatures in these states were quick learners. Though experiencing no shortage of challenges to their districting plans, the states effectively internalized the lessons of their racial gerrymandering missteps of the 1990s and successfully defended their apportionment plans against all claims made under *Shaw/Miller*.

1. Georgia

Between 2001 and 2008, the U.S. Supreme Court issued not one but two major opinions on redistricting based on Georgia's state senate plan: *Georgia v. Ashcroft*,[201] and *Larios v. Cox*.[202] Though both opinions led to significant interpretations of redistricting law generally, in neither case did the court find a violation of the *Shaw/Miller* doctrine.

Following the 2000 Census, Georgia's increase in population between 1990 and 2000 resulted in the allocation of two additional Congressional seats to the State.[203] In 2001, the Georgia General Assembly enacted new apportionment plans for Congressional as well

201. 539 U.S. 461 (2003). *See supra* text accompanying notes 67–73.
202. 542 U.S. 947 (2004).
203. For a detailed overview of Georgia's redistricting litigation between 2000 and 2006, see generally *Kidd v. Cox*, No. 1:06-CV-0997-BBM 2006, 2006 U.S. Dist. LEXIS 29689 (N.D. Ga. May 16, 2006).

as legislative districts for the Georgia House and Senate.[204] The Congressional apportionment plan and the plan for the state house districts were both pre-cleared under Section 5 of the Voting Rights Act in a declaratory action before the United States District Court for the District of Columbia in 2002.[205] In this same action, however, the District Court found the state senate districting plan to be retrogressive and thus in violation of Section 5.[206] Though the U.S. Supreme Court later reversed the district court's analysis of the state senate plan in its June 2003 decision in *Georgia v. Ashcroft*,[207] during the appeal the Georgia state legislature passed an interim state senate plan for the November 2002 elections. The U.S. District Court for the District of Columbia subsequently pre-cleared that interim plan on June 3, 2002.[208]

This interim state senate plan and the original 2001 state house and U.S. Congressional plans were subsequently challenged in a Georgia federal district court.[209] In *Larios v. Cox*, plaintiffs alleged that all three apportionment plans were malapportioned, in violation of the one person, one vote principle, and that plans were unconstitutional gerrymanders based on race and partisanship.[210] The district court issued a summary judgment rejecting the plaintiff's partisan gerrymandering claims and declined to consider the racial gerrymandering claim,[211] ultimately rejecting both the state house and senate plans as unconstitutional violations of the Equal Protection Clause's one person, one vote equal apportionment requirements under *Reynolds v. Sims*.[212] The court specifically found that each district "deviates from population equality by a total of 9.98% of the ideal district population[,]" and concluded that "the plans arbitrarily and discriminatorily dilute and debase the weight of certain citizens' votes by intentionally and systematically underpopulating districts in rural south Georgia and inner-city Atlanta, correspondingly overpopulating the districts in

204. *Id.* at *3.

205. Georgia v. Ashcroft, 195 F. Supp. 2d 25, 97 (D.D.C. 2002).

206. *Id.*

207. 539 U.S. 461 (2003).

208. Kidd v. Cox, No. 1:06-CV-0997-BBM 2006, 2006 U.S. Dist. LEXIS 29689, at *4 (N.D. Ga. May 16, 2006).

209. Larios v. Cox, 300 F. Supp. 2d 1320, 1321–22 (N.D. Ga. 2004).

210. *Id.*

211. Pending the resolution of the preclearance process following the U.S. Supreme Court's remanding of *Georgia v. Ashcroft*, 539 U.S. 461 (2003). However, the district court declined to reconsider and decide the case on remand. A local three-judge court invalidated the senate plan on one person, one vote grounds and implemented a court ordered plan. Larios v. Cox, 300 F. Supp. 2d 1320 (N.D. Ga. 2004), *aff'd* 542 U.S. 947 (2004). As a consequence, the preclearance of the three senate districts at issue in *Georgia v. Ashcroft* was rendered moot.

212. *Larios*, 300 F. Supp. 2d 1320, 1321–22.

suburban areas surrounding Atlanta, and by underpopulating the districts held by incumbent Democrats."[213]

After a federal court appointed a committee to create a new legislative apportionment plan for the 2004 elections,[214] the Georgia Assembly enacted their own plan in early 2006, Senate Bill 386, which the Justice Department precleared the following April.[215] Subsequent litigation challenged the plan as a violation of the one person, one vote principle and as partisan gerrymander in violation of the Equal Protection Clause, but no claims were made against the new plan under the *Shaw/Miller* doctrine.[216] Thus, no less than one decade after the State of Georgia's districting plan compelled the Supreme Court to outlaw the use of race as a "predominant factor" in districting,[217] and despite still having some difficulty complying with the much older one person, one vote principle of *Reynolds v. Sims*, the litigation surrounding the Georgia Assembly's apportionment plans enacted after the 2000 U.S. Census indicate that the Assembly had fully integrated compliance with the Court's *Shaw/Miller* doctrine into its districting process.[218]

2. *North Carolina*

Few states have had as great an impact on the development of redistricting and election law as North Carolina.[219] Redistricting efforts following the 2000 census could have continued this trend. By 2008, a federal district court in North Carolina reviewing a fourth challenge to a state legislature plan noted that, since the 2000 census, "the North Carolina Supreme Court has found the General Assembly's redistricting plans unconstitutional three times."[220] But while the state

213. *Id.* at 1322. The court also upheld Georgia's congressional reapportionment plan, finding that the "very small population deviations are supported by legitimate state interests in avoiding additional precinct-splitting and in ensuring that those precincts that are divided are split along easily recognizable boundaries wherever possible." *Id.*

214. *Id.* at 1321–22.

215. Kidd v. Cox, No. 1:06-CV-0997-BBM 2006, 2006 U.S. Dist. LEXIS 29689 (N.D. Ga. May 16, 2006).

216. *Id.*

217. Miller v. Johnson, 515 U.S. 900 (1995).

218. *See also* Bodker v. Taylor, No. Civ.A.1:02-CV-999ODE, 2002 U.S. Dist. LEXIS 27447 (N.D. Ga. June 5, 2002) (finding that a county commissioner districting plan violated the one person, one vote principle, but was consistent with the racial fairness requirements of Sections 2 and 5 of the Voting Rights Act of 1965 and did not violate other gerrymandering principles).

219. *See, e.g.*, Easley v. Cromartie, 532 U.S. 234 (2001); Hunt v. Cromartie, 526 U.S. 541 (1999); Shaw v. Hunt, 517 U.S. 899 (1996); Shaw v. Reno, 509 U.S. 630 (1993); Thornburg v. Gingles, 478 U.S. 30 (1986).

220. Dean v. Leake, 550 F. Supp. 2d 594, 597 (E.D.N.C. 2008) (citing Stephenson v. Bartlett (*Stephenson I*), 562 S.E.2d 377, 384 (N.C. 2002); Stephenson v. Bartlett (*Stephenson II*), 582 S.E.2d 247, 254 (N.C. 2003)).

supreme court has not been shy about overturning the North Carolina legislature's redistricting plans, at no point following the 2000 census did a state or federal court in North Carolina find a redistricting scheme to violate the principles elucidated in *Shaw* and *Miller*. Indeed, in the state where litigation spawned the case, *Shaw v. Reno*, that led to the creation of racial gerrymandering claims, it appears that, while the apportionment process remains flawed, the General Assembly has fully absorbed and integrated Justice O'Connor's and Justice Kennedy's analyses in *Shaw* and *Miller*, respectively, into their redistricting practices.

The most significant redistricting challenge in North Carolina following the 2000 Census is *Stephenson v. Bartlett (Stephenson I)*, a case so extensive that it garnered two separate opinions from the North Carolina Supreme Court.[221] On February 15, 2002, four days after the Justice Department approved North Carolina's house and senate district plans as non-retrogressive under Section 5, a state court ruled from the bench that the plans violated a provision of the North Carolina constitution that requires counties to be kept whole when drawing state house and senate districts.[222] The case turned entirely on a question of state constitutional interpretation[223] and did not include any racial gerrymandering arguments in furtherance of the *Shaw / Miller* doctrine. The State Supreme Court later upheld the lower court's rejection of the plan, recognizing the fact that district lines dividing counties ignored traditional districting principles and violated the "whole county" requirement of the North Carolina state constitution[224] "for reasons unrelated to compliance with federal law."[225] To the contrary, the court specifically cited to *Shaw*, emphasizing that the "operation of federal law does not preclude states from recognizing traditional political subdivisions when drawing their legislative districts."[226] The court went on to emphasize in particular that compliance with Section 5 of the Voting Rights Act and the state constitution districting requirements was wholly possible.[227]

221. *Stephenson I*, 562 S.E.2d 377; *Stephenson II*, 582 S.E.2d 247.

222. *Stephenson I*, 562 S.E.2d 377.

223. Stephenson v. Bartlett, 180 F. Supp. 2d 779, 782–83 (E.D.N.C. 2001) (remanding the case to state court on the grounds that plaintiffs had challenged the 2001 legislative redistricting plans solely on the basis of state constitutional provisions; thus the complaint "only raises issues of state law").

224. The whole county provision of the North Carolina constitution requires that the physical boundaries of any such non-VRA legislative district not cross or traverse the exterior geographic line of any such county. N.C. CONST. art. II, §§ 3(3) & 5(3). *See Stephenson I*, 562 S.E.2d at 384.

225. *Stephenson I*, 562 S.E.2d at 398.

226. *Id.* at 396.

227. *Id.* at 396 ("It remains possible, therefore, to comply with both the VRA and the [state constitution] as reconciled with other provisions of state law.").

Just over one year later, after the adoption of a new districting plan to replace the plan rejected in *Stephenson I*,[228] the North Carolina Supreme Court was again asked to review a finding from a lower court that rejected both the state senate and house plans as a violation of the whole county and compactness requirements of state constitution.[229] In *Stephenson II*, the state court also upheld the lower court's conclusion that both plans violated Section 2 of the Voting Rights Act because it did not maximize the number of possible "safe" districts for voters of color.[230] But the court's opinion did not explicitly discuss any racial gerrymandering claim under the *Shaw/Miller* doctrine.

Two more recent North Carolina redistricting opinions were also critical of North Carolina redistricting schemes but neither address any viable *Shaw/Miller* claims. In *Pender County v. Bartlett*,[231] the state supreme court found violations of state constitutional law, but did not entertain any *Shaw* challenges. In *Dean v. Leake*,[232] a federal district court weighed in on "alleged constitutional defects" in the state legislative redistricting scheme. The court evaluated five claims, one of which was an allegation that the plan was an unconstitutional racial gerrymander, in violation of the *Shaw/Miller* doctrine under the Equal Protection Clause of the U.S. Constitution.[233] The federal court in *Dean* rejected the claims, declining to issue a preliminary injunction due to the lack of "any evidence of invidious intent on the part of the General Assembly," and the court's conclusion that there was "an insufficient amount of proof to grant the extraordinary remedy of a preliminary injunction" in response to the allegations.[234]

3. Texas

Georgia and North Carolina's compliance with the U.S. Supreme Court's constitutional requirements established in *Shaw* and *Miller* in the post-2000 Census redistricting cycle, as evidenced in the absence of any successful racial gerrymandering challenges in both states, is not the end of the story. An evaluation of redistricting litigation in every other state required to comply with Section 5 of the Voting Rights Act reveals a similar complete absorption of and compliance

228. After the General Assembly enacted new house and senate plans on May 17, Superior Court Judge Knox V. Jenkins threw them out and drew maps of his own. The court's house plan was a modification of the one adopted by the General Assembly. The court's senate plan was a modification of one submitted to the court by the plaintiffs. *See Stephenson II*, 582 S.E.2d at 248–49.

229. *Id.* at 247.

230. *Id.*

231. 649 S.E.2d 364 (N.C. 2007).

232. 550 F. Supp. 2d 594 (E.D.N.C. 2008).

233. *Id.* at 596.

234. *Id.* at 606.

with the mandates of both Section 5 and the principles against racial gerrymandering laid forth in the *Shaw/Miller* cases.

The State of Texas endured what was perhaps the most dramatic saga of the post-2000 redistricting litigation cycle, complete with state legislators fleeing the state—twice—in order to delay the passage of what they viewed to be an inordinately partisan apportionment plan for the state's congressional districts.[235] The litigation surrounding the redistricting debate began in 2001 with *Balderas v. State*,[236] in which a federal district court drew and instituted a congressional plan for the 2002 elections.[237] In 2003, the Texas Legislature attempted to pass a new congressional plan during its regular session, but needed three special sessions to reach an agreement before enacting Congressional Districting Plan 1374C in October 2003.[238] A few months later, several plaintiffs challenged Plan 1374C on the grounds that it was an unconstitutional partisan and racial gerrymander and a violation of Section 2 of the Voting Rights Act.[239]

In *Session v. Perry*,[240] the U.S. District Court for the Eastern District of Texas rejected the challenges and upheld the plan. In regards to the plaintiff's racial gerrymandering claim, the court described the evidentiary requirements in both *Shaw* and *Miller*,[241] and concluded that there was not sufficient proof of racial gerrymandering, instead finding that "the single-minded purpose of the Texas Legislature in enacting Plan 1374C was to gain partisan advantage."[242] In reaching this conclusion, the district court emphasized the fact that "African-Americans in Texas vote overwhelmingly for Democratic candidates

235. *See* STEVE BICKERSTAFF, LINES IN THE SAND: CONGRESSIONAL REDISTRICTING IN TEXAS AND THE DOWNFALL OF TOM DELAY (2007); Tokaji, *supra* note 25, at 808.

236. No. 6:01CV158, 2001 U.S. Dist. LEXIS 25740 (E.D. Tex. Nov. 14, 2001). For a detailed account of the litigation and maneuvering that preceded *Balderas*, see *id.* at *9–10.

237. Session v. Perry, 298 F. Supp. 2d 451, 461 (E.D. Tex. 2003) ("As a result of the 2002 elections, the Texas congressional delegation included seventeen Democrats and fifteen Republicans. However, with their newly drawn state districts, legislative Republicans gained control over both houses of the Texas State Legislature, as well as control over all prominent Executive Branch positions.").

238. *Id.* at 469–70.

239. *Id.* Plaintiffs also alleged that the Texas legislature was not permitted to redraw congressional district lines mid-decade. The district court rejected this argument, holding that the plaintiffs failed to "provide any authority—constitutional, statutory, or judicial—demonstrating that mid-decade redistricting is forbidden in Texas." *Id.* at 458. The U.S. Supreme Court subsequently upheld the court's rejection of this allegation. *See* League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006).

240. 298 F. Supp. 2d 451 (2003).

241. *Id.* at 470 (noting that "*Miller* instructs that we are to engage in a searching review of district lines 'predominantly motivated' by race when a state subordinates traditional districting practices to race").

242. *Id.* at 470.

. . . belie[s] the assertion that Texas intentionally discriminated against the African-American voters."[243] The court went so far as to find that the legislature's efforts to draw various congressional lines "were not taken because of race; they were taken in spite of it,"[244] explaining:

> While keenly aware of the long history of discrimination against Latinos and Blacks in Texas, and recognizing that their long struggle for economic and personal freedom is not over, we are compelled to conclude that this plan was a political product from start to finish. The myriad decisions made during its creation were made in spite of, and not because of, its effects upon Blacks and Latinos. . . . [W]e are not persuaded that this most fundamental boundary of the *Equal Protection Clause* was crossed. In the redistricting arena, an area that has proven most reluctant to yield discernible standards, there are large incentives to reach for the seeming certainty of the *Equal Protection Clause*'s familiar condemnation of purposeful racial discrimination and draw upon its comforting moral force, rather than confront the task of developing proper standards or concede their ephemeral political character. To our eyes, the certainty is an illusion, and its deployment to heel radical partisan line-drawing by state legislatures is a mistake.[245]

After evaluating a significant amount of evidence as to the motivations of the state legislature,[246] the court concluded that the plaintiffs "ha[d] not met their significant burden of demonstrating racial gerrymandering."[247]

The district court's opinion was later vacated and remanded for reconsideration after the U.S. Supreme Court decided *Vieth v. Jubelirer*,[248] a case that addressed the ongoing justiciablity of political gerrymandering allegations. On remand, the district court, believing the scope of its mandate was limited to questions of political gerrymandering, again rejected the plaintiffs' challenge.[249] That opinion was appealed to the U.S. Supreme Court, and in June 2006 the Court upheld the district court's determination that plaintiffs had failed to

---

243. *Id.* at 471.

244. *Id.* at 472. *See also id.* (noting expert testimony provided by the plaintiffs that "'one would have a very hard time not recognizing that the State has a very strong partisan motivation in this particular map'" led the court to its "conclusion that politics, not race, drove Plan 1374C").

245. *Id.*

246. *See id.* at 509–12 (noting that the record before the court indicates that the "State provided credible race-neutral explanations for Plan 1374C's county cuts, city divisions, and linking of border and Central Texas communities," and emphasizing that the "record does not present evidence of statements by legislators or staff supporting the claim that ethnicity predominated in the redistricting process. To the contrary, the emails, statements, and other communications from those involved in the process reveal that politics predominated").

247. *Id.* at 513.

248. 541 U.S. 267 (2004).

249. League of United Latin Am. Citizens v. Perry, 399 F. Supp. 2d 756, 758 (E.D. Tex. 2005) (rejecting "claims that the redistricting plan for the election of the thirty-two members of Congress from Texas, adopted by the Texas legislature in 2003, is unconstitutionally tainted by excessive partisan purpose").

state a viable political gerrymandering claim.[250] While the Court did find that the Texas legislature violated Section 2 of the Voting Rights Act in drawing the boundaries for one congressional district, District 23,[251] the Justices' opinion did not need to address the race-based equal protection arguments against the district and vacated the lower court's determination of that claim.[252]

During the post-2000 round of redistricting litigation, Texas courts heard several other challenges to various other post-2000 redistricting schemes, but all have involved either a challenge under Section 2 of the Voting Rights Act,[253] or arguments that districts were malapportioned, in violation of the constitutional principle of one person, one vote.[254] Thus, no court entertained a successful racial gerrymandering challenge to a Texas redistricting plan following the 2000 Census.

B. Redistricting Litigation in Other States Covered Under Section 5

As went Texas, North Carolina, and Georgia, so went every other state obligated to comply with Section 5 of the Voting Rights Act. No federal or state court reviewing redistricting claims in Virginia, Mississippi, Alabama, Louisiana, South Carolina, Arizona, or partially covered states of California, Florida, Michigan, New Hampshire, South Dakota, Alaska, or New York, found that any state had violated the restrictions on racial gerrymandering set forth in *Shaw* and *Miller*. But that result certainly was not for lack of trying. Plaintiffs in several of these states levied claims against various redistricting schemes, alleging that, as state legislatures had done so frequently following the 1990 Census, plans had been drawn relying on race as a predominant factor. Yet courts reviewing such claims consistently held that the authors of the challenged plans had internalized and complied with the restrictions created under *Shaw* and *Miller*.

---

250. League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006).

251. *Id.*

252. *Id.* at 410.

253. Rodriguez v. Bexar County, 385 F.3d 853 (5th Cir. 2004) (overturning a lower court's conclusion that Bexar County, Texas's redistricting of its Justice of the Peace and Constable Precincts following the 2000 Census violated Section 2 of the Voting Rights Act).

254. *See, e.g.*, Mayfield v. Texas, 206 F. Supp. 2d 820 (E.D. Tex. 2001) (dismissing a complaint that the current congressional, senate, and house districts were malapportioned based on the 2000 census on standing and ripeness grounds); Perry v. Brown, 68 S.W.3d 734 (Tex. 2001) (alleging that the 2000 census showed that the current state senate and house districts were malapportioned); Perry v. Del Rio, 66 S.W.3d 239 (Tex. 2001) (same allegations, also dismissed on standing grounds).

1. Virginia

In Virginia, the most significant challenge to a districting plan emerged in the case of *Wilkins v. West*.[255] In November 2002, the Supreme Court of Virginia upheld a 2001 house and senate legislative redistricting plan, overturning a lower court's determination that, among other things, the plan was an unconstitutional racial gerrymander in violation of the *Shaw/Miller* line of cases.[256] In *Wilkins*, the Supreme Court of Virginia rejected the lower court's finding that race was a predominant factor in the drawing of several senate and house legislative seats, reasoning that under *Hunt v. Cromartie*,[257] a plaintiff "asserting that a legislative redistricting plan has improperly used race as a criterion must show that the legislature subordinated traditional redistricting principles to racial considerations and that race was not merely *a* factor in the design of the district, but was *the* predominant factor . . . [and] that a facially neutral law is explainable on no other grounds but race."[258] The Virginia Supreme Court went on to cite *Cromartie* in reasoning that "where majority-minority districts . . . are at issue and where racial identification correlates highly with political affiliation, the party attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles."[259]

Based on this analysis, the Virginia court concluded that "in this case, the defendants readily acknowledged that race was a consideration in drawing the district lines,"[260] considered in part in order to ensure compliance with Sections 2 and 5 of the Voting Rights Act.[261]

255. 571 S.E.2d 100 (Va. 2003).

256. *See* West v. Gilmore, 2002 Va. Cir. LEXIS 37 (Va. Cir. Ct. Mar. 10, 2002) (concluding that 2001 house and senate redistricting plans segregated voters on the basis of race and packed minority voters into just a few districts, in violation of the Voting Rights Act, the Equal Protection Clause of the Fourteenth Amendment, and the Virginia Constitution). The circuit court specifically found that six senate and twelve house districts were drawn along racial lines and packed as many minority voters as possible into just a few districts in order to minimize their political influence. *Id.*

257. 532 U.S. 234 (2001).

258. *Wilkins*, 571 S.E.2d at 111–12 (Va. 2002) (emphasis in original) (citing Hunt v. Cromartie, 532 U.S. 234, 241–42 (2001)).

259. *Id.* at 111 (citing *Cromartie*, 532 U.S. at 258).

260. *Id.* at 112.

261. *Id.* ("The General Assembly was required to comply with the provisions of the VRA which mandate that a redistricting plan not dilute the African-American voter strength, and that there be no retrogression in the plan; that is, the plan must contain no fewer majority minority districts than the prior plan."). *See also id.* at 115 ("Unquestionably, the complainants have shown that race was a factor in designing these majority minority districts. Indeed, to comply with the non-retrogression requirements of Section 5 of the VRA, race had to be a factor in drawing these districts. The defendants have never maintained otherwise. The

But because plaintiffs failed to "carry their burden of proof that race was the predominant factor used by the General Assembly and that qualifying alternative plans were available," the court soundly rejected any allegations that Virginia's state legislative apportionment plan violated the *Shaw/Miller* doctrine.[262]

In 2004, federal courts also heard a significant challenge to Virginia's congressional districting plan. In *Hall v. Virginia*,[263] the Fourth Circuit rejected allegations that Virginia's Fourth Congressional District, as enacted in 2001 and precleared by the Justice Department shortly thereafter, violated Section 2 of the Voting Rights Act because it diluted minority votes and significantly impacted the ability of African American voters to elect a candidate of their choice.[264] The court rejected the claims, which did not include any charges of unconstitutional racial gerrymandering, on the grounds that plaintiffs had not submitted sufficient evidence that "black voters have been denied an equal opportunity to elect candidates of their choice."[265]

2. *Mississippi*

Of the three significant challenges to redistricting plans in Mississippi following the 2000 Census, only one involved a claim that the state legislature had violated the racial gerrymandering restrictions under the Equal Protection Clause.[266] In *Woullard v. Mississippi*, plaintiffs claimed that the Mississippi legislature relied on race as a predominant factor in drawing one state senate district, District 45, in

---

record shows however, that these districts also were drawn with attention to such factors as population equalization, compactness and contiguity, retention of core districts where possible, and enhancement of communities of political interest.").

262. *Id.* at 114. *See, e.g., id.* ("Legislatures must balance competing redistricting criteria in creating electoral districts. This record contains substantial evidence that the General Assembly implemented a number of traditional principles of redistricting in creating Senate District 2 and, accordingly, does not support the conclusion that race predominated in the design of the district."). Virginia Supreme Court Justice Hassell felt so strongly about the court's conclusion that he wrote a separate concurrence to emphasize his view that "the plaintiffs failed to establish that the General Assembly used race as the predominant factor in the redistricting plan." *Id.* at 121 (Hassell, J. concurring).

263. 385 F.3d 421 (4th Cir. 2004).

264. *Id.* at 423.

265. *Id.* at 431.

266. *See* Woullard v. Mississippi, 2006 U.S. Dist. LEXIS 46561 (S.D. Miss. June 29, 2006). In addition to *Woullard*, the other redistricting cases were *Branch v. Smith*, 538 U.S. 254 (2003) (enjoining implementation of a congressional plan drawn by the state court because it had not been precleared under Section 5 of the Voting Rights Act) and *Garrard v. City of Grenada*, 2005 U.S. Dist. LEXIS 34350 (N.D. Miss. Sept. 7, 2005) (finding that Grenada violated the Constitution's one person, one vote principle by refusing to update the city's ward districting scheme in light of the 2000 decennial census figures).

Mississippi's 2002 redistricting plan.[267] Plaintiffs presented evidence that African Americans were removed from the district because of their race,[268] and pointed to discussions with legislators that gave the "impression" that the district "was drawn with the race-based goal of minimizing the number of minority voters in the district."[269] The federal district court, though appreciative of the evidence, concluded that the district was redrawn with the goals of meeting equal population requirements, complying with the Voting Rights Act, and satisfying the requests of incumbent senators.[270] The court dismissed the complaint, specifically holding that the Judges found "no evidence . . . that race was a predominant factor in the drafting of District 45, or any other district."[271]

3. Alabama

In June 2001, two separate federal lawsuits were filed challenging the Alabama legislature's failure to draw new districts following the release of population figures under the 2000 Census.[272] As a result, the Alabama legislature convened a special session and enacted a redistricting plan, and both plans received preclearance under Section 5 of the Voting Rights Act.[273] The plaintiffs in one of the cases then amended their complaint to challenging the constitutionality of the newly enacted plans.[274] The plaintiffs specifically alleged that the 2001 redistricting plans violated the constitutional requirements of one person, one vote and constituted unconstitutional racial gerrymandering by overpopulating white majority districts.[275] The district court rejected the arguments, holding that plaintiffs failed "to substantiate their racial gerrymandering claim" or otherwise meet their burden to show that the state's apportionment determinations were improperly motivated by race.[276]

267. *Woullard*, 2006 U.S. Dist. LEXIS 46561, at *8.

268. *Id.*

269. *Id.* at *24.

270. *Id.* at *29–30.

271. *Id.* at *29.

272. Montiel v. Davis, 215 F. Supp. 2d 1279 (S.D. Ala. 2002); Barnett v. Alabama, 171 F. Supp. 2d 1292 (S.D. Ala. 2001). *See also*, Gustafson v. Johns, 213 Fed. Appx. 872 (11th Cir. 2007) (finding that a 2007 challenge asserting Alabama's 2001 legislative redistricting plans violated the constitutional guarantee of one person, one vote was barred under the doctrine of res judicata).

273. *Montiel*, 215 F. Supp. 2d. at 1282.

274. *Id.* at 1281 n.2.

275. *Id.* at 1282.

276. *Id.* at 1286–87.

4. California

While state and federal courts in California heard various redistricting challenges following the 2000 Census,[277] the most significant case was *Cano v. Davis*.[278] The case grew out of a response to the State's redistricting process, which involved the addition of one congressional district and a reconfiguration of 120 districts for the state senate and assembly.[279] Several Latino voters and advocacy groups such as the Mexican American Legal Defense and Educational Fund (MALDEF) filed suit in 2002 to challenge the legality of two congressional districts and one state senate district in the plan[280] arguing that the three districts violated Section 2 of the Voting Rights Act and the *Shaw/Miller* doctrine under the Equal Protection Clause of the Fourteenth Amendment.[281]

In *Cano*, the federal district court rejected the racial gerrymandering claim based on a finding that plaintiffs failed to produce sufficient evidence that the legislature's redistricting decisions were based solely on racial considerations.[282] Noting that each of the Supreme Court's "racial gerrymandering cases emphasize that a plaintiff bringing such a claim faces an extraordinarily high burden," and that *Shaw* violations occurred only in "exceptional" cases where race was the *predominant* consideration in drawing district lines, the opinion cautioned that "awareness of race is essential to fairness in districting."[283] After a review of the plaintiffs' evidence, the court concluded that "the evidence in the record suggests that the legislature did not violate the principle that race is a *permissible* criterion to use in the redistricting so long as it is not the *predominant* criterion."[284] The court further emphasized that the plaintiffs were also unable to

277. *See, e.g.*, Nadler v. Schwarzenegger, 41 Cal. Rptr. 3d 92 (2006) (rejecting claims that a districting plan that divided the town of Santa Clara into two state legislative districts violated the California constitution).

278. 211 F. Supp. 2d 1208, 1211–12 (C.D. Cal. 2002).

279. *Id.* at 1211.

280. *Id. See also id.* at 1213 ("Plaintiffs challenge the legality of three districts: Congressional District 28 . . . located in the San Fernando Valley of Los Angeles County; Congressional District 51 . . . which includes portions of San Diego County and the entirety of Imperial County; and State Senate District 27 . . . which is comprised of several communities in Southeast Los Angeles County, including parts of the City of Long Beach.").

281. *Id.* at 1213–14.

282. *Id.* at 1214–29.

283. *Id.* at 1215 (noting that as a result of historical discriminatory policies, "the provisions of the Voting Rights Act oftentimes require a redistricting legislature to consider the effect of its decisions on the political power of racial groups, and to take race into account when drawing lines").

284. *Id.* at 1216 (emphasis in original). *See also id.* at 1218 ("[T]here is no evidence in the record that either district . . . is explainable only in terms of race.").

produce any evidence that the legislature "abandoned traditional districting principles" in drawing district lines.[285]

5. New York

There were perhaps more challenges to districting plans in New York following the 2000 Census than in any other state.[286] Two cases involved racial gerrymandering claims: *Rodriguez v. Pataki*[287] and *Montano v. Suffolk County Legislature*.[288] The *Rodriguez* case was by far the more protracted of the two and included eight claims against the State's 2002 senate districting plan and congressional districting plans. The claims primarily involved violations of Section 2 of the Voting Rights Act and the one person, one vote principle of the Equal Protection Clause, but one of the claims alleged that state senate District 34, a majority white district, was an unconstitutional racial gerrymander in violation of *Shaw / Miller*.[289] Five counts, including the one person, one vote malapportionment claim, were dismissed on summary judgment,[290] with the court reviewing evidence at trial on the racial gerrymandering claim.

At trial, plaintiffs argued that the district was not compactly shaped, referring to it as "something like a doughnut that has had a bite taken out of it and then been run over by a car."[291] The State of New York argued effectively in response that they had indeed complied with the *Shaw / Miller* principles, that race was not a predominant factor in their determinations, and that any changes made to the district were made to "achieve substantial population equality," protect incumbents, comply with the Voting Rights Act, and help Republicans retain a majority of seats in the state senate.[292] The court agreed with the State, noting that the compactness of the district was

285. *Id.* at 1223.

286. *See, e.g.*, Loeber v. Spargo, 2008 U.S. Dist. LEXIS 1416 (N.D.N.Y Jan. 8, 2008); Cecere v. County of Nassau, 258 F. Supp. 2d 184, 187 (E.D.N.Y. 2003) (rejecting a malapportionment claim against the county).

287. 308 F. Supp. 2d. 346 (S.D.N.Y. 2004).

288. 268 F. Supp. 2d. 243 (E.D.N.Y. 2003).

289. *See* Rodriguez v. Pataki, 308 F. Supp. 2d 346, 359–60 (S.D.N.Y. 2004) (describing all eight counts: Count I—the Senate Plan violates the "one person, one vote" requirement of the Fourteenth Amendment; Count II—the Senate Plan violates Section 2 of the Voting Rights Act; Count III—Bronx-based senate districts violate Section 2 of the Voting Rights Act; Count IV—SD 31 in Manhattan/Bronx violates Section 2 of the Voting Rights Act; Count V—Nassau County Senate districts violate Section 2 of the Voting Rights Act; Count VI—Suffolk County senate districts violate Section 2 of the Voting Rights Act; Count VII—SD 34 in the Bronx/Westchester is a racial gerrymander in violation of the Fourteenth Amendment; and Count VIII—CD 17 in the Bronx, Westchester, and Rockland counties violates Section 2 of the Voting Rights Act).

290. *Id.* at 361.

291. *Id.* at 449.

292. *Id.* at 445.

not irregular,[293] and that there was no sufficient evidence to indicate that race was the predominant factor in any districting decisions,[294] or that traditional districting principles had been subordinated to racial considerations.[295] The court also cited *Cromartie*,[296] and emphasized the lack of evidence that "considerations of race rather than politics predominated in the configuration" of the challenged senate district.[297]

As *Rodriguez* litigation percolated through the district court,[298] other voters filed a lawsuit in Suffolk County, New York, to challenge the redistricting plan for the county legislature. In *Montano v. Suffolk County Legislature*,[299] the federal district court for the Northern District of New York rejected allegations that two state legislature districts were drawn "based predominately on rac[ial]" considerations.[300] In reaching its conclusion, the court noted that the districts were sufficiently compact to comply with *Shaw*, discussed testimony arguing that the districts had been developed using traditional, race-neutral principles, and emphasized that plaintiffs simply failed to produce evidence that decisions to draw either district were based predominantly on race.[301]

6. South Dakota

Courts in South Dakota also rejected all racial gerrymandering challenges following the 2000 U.S. Census, with the United States Court of Appeals for the Eighth Circuit ultimately finding that neither the district lines for the state legislature[302] nor city wards drawn in Martin, South Dakota[303] were drawn in violation of the *Shaw/Miller* doctrine. In *Cottier v. City of Martin*,[304] the Eighth Circuit did find that city wards in Martin, South Dakota were configured in a manner that intentionally and effectively diluted the voting strength of American Indian voters, in violation of Section 2 of the Voting Rights Act.[305] But the court also emphasized that race was not a predominant factor in the decisions to craft the city wards, noting that "the shapes of the

293. *Id.* at 450 (noting that the district "is close to the average in compactness of all districts in the State").
294. *Id.* at 455–57.
295. *Id.* at 457–59.
296. Easley v. Cromartie, 532 U.S. 234 (2001).
297. *Rodriguez*, 308 F. Supp. 2d at 460.
298. The district court's decision discussed above was summarily affirmed by the U.S. Supreme Court. *See* Rodriguez v. Pataki, 543 U.S. 997 (2004).
299. 268 F. Supp. 2d 243 (E.D.N.Y. 2003).
300. *Id.* at 269.
301. *Id.* at 269–70.
302. Bone Shirt v. Hazeltine, 461 F.3d 1011 (8th Cir. 2006).
303. Cottier v. City of Martin, 445 F.3d 1113 (8th Cir. 2006).
304. *Id.*
305. *Id.* at 1115.

proposed districts would not draw constitutional scrutiny because the districts are not primarily based on race."[306]

Similarly, the Eighth Circuit upheld a district court's determination that a proposed districting plan for South Dakota's state legislature violated Section 2 of the Voting Rights Act,[307] while also concluding that the court's remedial plan, put in place to remedy the violations, was not an unconstitutional racial gerrymander. In *Shirt v. Hazeltine*,[308] the Eighth Circuit heard arguments from legislators defending their plan against the Voting Rights Act claims that the court's remedial plan was improperly based on race. The appellate court concluded that the district court's remedial plan ensured that Native American voters had the opportunity to elect representatives of their choice while also finding that race was only one factor, not the predominant factor, in the court's development of the plan.[309] The court reasoned that the district borders in the plan "are compact and respect traditional boundaries," while not being "so irregularly shaped that it seems the primary principle in shaping the district was to include or exclude Native-Americans from any one particular district."[310]

7. *Arizona, Florida, and the Rest*

Courts in the seven states covered under Section 5 not discussed above—Louisiana, South Carolina, Arizona, New Hampshire, Michigan, Alaska and Florida—did not entertain any significant legal clams of racial gerrymandering to post-2000 redistricting plans. The states were, of course, not without their own redistricting sagas, and several claims were brought in nearly every state under theories of either malapportionment or a violation of Section 2 of the Voting Rights Act.[311] In South Carolina, for example, in *Colleton County Council v.*

306. *Id.* at 1118.
307. Bone Shirt v. Hazeltine, 387 F. Supp.2d 1035 (D.S.D. 2005).
308. 461 F.3d 1011 (8th Cir. 2006).
309. *Id.* at 1020–21.
310. *Id.*
311. *See, e.g.*, Ariz. Minority Coalition for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n, 366 F. Supp. 2d 887 (D. Ariz. 2005) (refusing to enforce a redistricting plan that had not yet received preclearance from the U.S. Department of Justice); Tangipahoa Citizens for Better Gov't v. Parish of Tangipahoa, 2004 U.S. Dist. LEXIS 13850 (E.D. La. July 19, 2004) (dismissing a challenge under Section 2 of the Voting Rights Act to a 2003 city council redistricting plan as moot because the plan was not precleared under Section 5); Navajo Nation v. Ariz. Indep. Redistricting Comm'n, 230 F. Supp. 2d 998 (D. Ariz. 2002) (finding that Arizona's independent redistricting commission (IRC) had not been precleared by the Justice Department and instituting an interim court-drawn plan for use during the 2002 elections); O'Lear v. Miller, 222 F. Supp. 2d 850 (E.D. Mich. 2002) (rejecting a political gerrymandering and Section 2 challenge to Michigan's 2001 congressional redistricting plan); Braun v. Borough, 193 P.3d 719 (Alaska 2008) (finding

McConnell[312] a federal court heard claims that the State's legislative districts were malapportioned and thus an unconstitutional violation of the one person, one vote requirements of the Equal Protection Clause.[313] Florida also saw a significant amount of redistricting litigation, but none of the cases involved allegations that the legislature or any county violated the *Shaw / Miller* doctrine in devising their apportionment schemes.[314]

C. How Section 5 Jurisdictions Achieved Universal Compliance with the *Shaw/Miller* Doctrine

The above analysis illustrates the fact that state legislatures operating in the post-2000 redistricting era appear to have learned the lessons of the 1990s, as illustrated by their universal compliance with both Section 5 of the Voting Rights Act and the constitutional principles of *Shaw* and *Miller*. There are various explanations as to why the Court's restrictions on the use of race in redistricting were so quickly

---

that a 2002 reapportionment plan's variance improperly exceeded 10%); *In re* 2001 Redistricting Cases, 47 P.3d 1089 (Alaska 2002) (alleging that districting plan violated the one person, one vote principle); Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n, 121 P.3d 843 (Ariz. 2005); Johnson v. State, 965 So. 2d 866 (La. 2007) (rejecting a claim to Louisiana's system of electing judges); Below v. Gardner, 963 A.2d 785, 793–94 (N.H. 2002) (addressing arguments that some of the districts in the State's new senate apportionment plan were malapportioned and concluding that the plan was drawn without consideration of partisanship).

312. 201 F. Supp. 2d 618 (D.S.C. 2002).

313. *Id.* (creating and instituting a redistricting plan for the South Carolina state legislature that complied with the principles of the U.S. Constitution and the Voting Rights Act). In recognition of its obligations under the *Shaw / Miller* doctrine, however, the district court in *Colleton County Council* did note that the "Voting Rights Act must always be considered in tandem with the strictures of the Equal Protection Clause, with the latter operating as a constant limit upon the degree to which state legislatures—and this court acting in its remedial capacity—can engage in race-based districting to achieve the goals of the Voting Rights Act." *Id.* at 636.

314. For further details on the post-2000 Florida redistricting process and relevant litigation, see JoNel Newman, *Unfinished Business: The Case for Continuing Special Voting Rights Act Coverage in Florida*, 61 U. MIAMI L. REV. 1, 15–17 (2006) (noting that "Florida's 2002 reapportionment process, similar to the 1992 process, involved controversy, allegations of partisan gerrymandering and minority vote dilution, litigation, and a Department of Justice Section 5 objection"). *See also, e.g.*, Martinez v. Bush, 234 F. Supp.2d 1275 (S.D. Fla. 2002) (rejecting Section 2 and political gerrymandering challenges to state legislature and congressional plans); Florida Senate v. Forman, 826 So. 2d 279 (Fla. 2002) (rejecting a political gerrymandering claim to a Florida State Senate districting plan); *In re* Constitutionality of House Joint Resolution 1987, 817 So. 2d 819 (Fla. 2002) (upholding a post-2000 Census based apportionment plan for the Florida Senate and House of Representatives as complying with the one person, one vote requirement of the U.S. Constitution and declining to address any additional federal claims).

absorbed by covered jurisdictions. Most significantly is the role that the *Cromartie* case has played in the development of the racial gerrymandering doctrine. Under *Cromartie*, the Supreme Court emphasized the importance of evaluating the partisan considerations in redistricting decisions that may lead observers to the conclusion, however misconstrued, that race was a predominant factor in districting decisions.[315] For example, the Court in *Cromartie* emphasized that it is permissible for state legislatures to draw district lines to include majority Democrat precincts, even where the district may end up containing more heavily African American precincts, because African Americans as a whole lean heavily Democratic. In other words, where partisan decisions lead to the creation of districts that appear to be gerrymandered based on race, the Supreme Court recognized in *Cromartie* that because the underlying intent behind the creation of such districts would be "political rather than racial," they are permissible under the Equal Protection Clause. As a result, many districting schemes that appeared to include a significant consideration of racial demographics, such as Texas[316] and Louisiana,[317] were upheld after defendant state legislatures argued that they drew lines based upon the partisan make up of jurisdictions, as opposed to racial demographics.

The other explanation for the lack of any *Shaw/Miller* violations in the post-2000 redistricting era is the evolution of the Justice Department's enforcement of Section 5 of the Voting Rights Act. Following the 1997 decision in *Bossier Parish I*, the Supreme Court directed the U.S. Department of Justice to grant preclearance regardless of whether a plan violated the vote dilution principles of Section 2 of the Voting Rights Act, removing pressure from Section 5 jurisdictions seeking preclearance to maximize the number of majority-minority districts in their plans.[318] And after *Bossier Parish II* in 1999, the Court further limited the Justice Department from denying preclearance to any plans enacted with the intent to discriminate against minority racial groups.[319]

As state efforts to draw new apportionment plans following the release of the 2000 U.S. Census demographics began to develop,[320] the

315. *See supra* discussion accompanying notes 177–184.

316. *See supra* discussion accompanying notes 235–254.

317. Tangipahoa Citizens for Better Gov't v. Parish of Tangipahoa, 2004 U.S. Dist. LEXIS 13850 (E.D. La. July 19, 2004) (dismissing a challenge under Section 2 of the Voting Rights Act to a 2003 city council redistricting plan as moot because the plan was not precleared under Section 5).

318. 520 U.S. 471 (1997). *See supra* discussion accompanying notes 59–63.

319. 528 U.S. 320 (2000). *See supra* discussion accompanying notes 63–66.

320. Following the 2000 Census, every state in the country was required to redraw district lines to ensure that districts were of equal population, in compliance with the one person, one vote principle of *Reynolds v. Sims*, 377 U.S. 533 (1964).

U.S. Department of Justice recognized these new interpretations of Section 5 and issued guidelines adopting the *Bossier Parish* doctrines on January 18, 2001.[321] The guidelines specifically emphasized that the Justice Department would not deny Section 5 preclearance "on the grounds that [a redistricting plan] violates *Shaw v. Reno*, or on the grounds that it violates Section 2 of the Voting Rights Act."[322] Importantly, the regulations also articulated that compliance with Section 5 "does not require jurisdictions to violate *Shaw v. Reno* and related cases," noting that the Justice Department's analysis of the post-2000 Census redistricting plans would "include a review of the submitting jurisdiction's historical redistricting practices . . . to determine whether the alternative plan would (a) abandon those practices and (b) require highly unusual features to link together widely separated minority concentrations."[323] In addition, the Justice Department would evaluate "plans that make the least departure from a jurisdiction's stated [traditional] redistricting criteria" with a favorable eye.[324]

This change in the enforcement of Section 5 resulted in a shift away from what many commentators view as the Justice Department's previous "maximization" policy, where covered jurisdictions were either encouraged or, often times, required to draw the maximum number of majority-minority districts possible in any plan in order to receive preclearance.[325] At the same time, the post-2000 redistricting cycle saw, for the first time, the widespread creation of coalition or "opportunity" districts, where voters of color are not the majority in a district, but are present in sizeable enough numbers to have the opportunity to elect their candidate of choice.[326] Some scholars have argued that the Justice Department's recognition of coalition districts was crucial to ensuring that covered jurisdictions are able to comply with both Section 5 and the *Shaw/Miller* doctrine of the Equal Protection Clause.[327]

---

321. Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 66 Fed. Reg. 5412 (Jan. 18, 2001).

322. *Id.* at 5412.

323. *Id.* at 5413.

324. *Id.*

325. *See, e.g.*, Tokaji, *supra* note 25, at 800–03 (describing the debate over whether the 1990s Justice Department promoted the maximization of majority-minority districts in covered jurisdictions, and noting that, at the very least, "the Supreme Court perceived the DOJ to have a policy of maximizing majority-minority districts").

326. Butler, *supra* note 199, at 243 (describing how the Justice Department's 2001 guidelines "hint that their past policy of 'maximization' of the number of majority-minority districts will be modified to press jurisdictions to maximize minority 'opportunity' districts").

327. *See* Daniel A. Zibel, *Turning the Page on Section 5: The Implications of Multiracial Coalition Districts on Section 5 of the Voting Rights Act*, 103 MICH. L. REV.

This combination of the change in the Justice Department's enforcement of Section 5 and the Supreme Court's softening of the *Shaw/Miller* doctrine through the recognition of the role of partisanship in *Cromartie* could explain the post-2000 synchronicity of Section 5 and the Equal Protection Clause. But the story does not end there. In 2006, Congress weighed in on Section 5 of the Voting Rights Act, extending the provision for an additional twenty-five years in response to mountainous evidence of ongoing discrimination in covered jurisdictions.[328] Part IV of this Article details the reauthorization and analyzes whether the Congressional amendments to Section 5 will alter the above described synergy between the Constitution and the Voting Rights Act.

IV. DID THE 2006 REAUTHORIZATION OF SECTION 5 AFFECT THE CURRENT SYNERGY BETWEEN SECTION 5 AND THE EQUAL PROTECTION CLAUSE?

The above analysis suggests that Section 5 jurisdictions have absorbed the lessons of *Shaw* and *Miller*, enduring an entire round of redistricting litigation without a single court finding that any state violated the constitutional mandate against racial gerrymandering. But in 2006, Congress held hearings over whether to extend Section 5, and other provisions of the Voting Rights Act, in light of their looming expiration in 2007. In response to mountains of evidence that the provisions were still needed,[329] Congress voted to reauthorize Section 5 for an additional twenty-five years, while also making a few adjustments and amendments to the provision to ensure it achieves the goal of its "original purpose."[330] The amendments specifically require the

189, 207–13 (2004) (arguing that "if a [Section 5 covered] jurisdiction is presented with the option of creating either coalition districts or equally effective majority-minority districts in order to comply with section 5, the Equal Protection Clause mandates the creation of coalition districts" and referring to the creation of coalition districts "as a partial solution to the tension between section 5 and the Equal Protection Clause").

328. *See* VRARA, *supra* note 17. *See generally, e.g.*, ELLEN KATZ, *Not Like the South?: Regional Variation and Political Participation Through the Lens of Section 2, in* VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION AND POWER 183–221 (Ana Henderson ed., 2007); Kristen Clarke, *The Congressional Record Underlying the 2006 Voting Rights Act: How Much Discrimination Can the Constitution Tolerate?*, 43 HARV. C.R.-C.L. L. REV. 385 (2008).

329. For a detailed description of the voluminous evidence presented to Congress on the need for an extension of Section 5 of the Voting Rights Act in particular, see generally Clarke, *supra* note 328.

330. *See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (Part I): Hearing on H.R. 9 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 1 (2006).

rejection, under Section 5, of any new apportionment plan or other change that is motivated by a discriminatory purpose and clarifies that covered jurisdictions submitting apportionment plans are required, under Section 5, to protect a minority community's ability to elect their preferred candidate of choice.[331]

Because the redistricting litigation cycle ended prior to the 2006 reauthorization, a question remains over whether any of the amendments to Section 5 will affect the previously described complimentary existence of Section 5 and the Equal Protection Clause. This section details these amendments to Section 5 and analyzes whether their enforcement can be expected to alter the current consistency between the provision and the *Shaw / Miller* interpretation of the Equal Protection Clause. It concludes that the amendments to Section 5 will not alter the ability of covered jurisdictions to comply with both Section 5 and the Equal Protection Clause of the U.S. Constitution.

In 2006, Congress passed the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (VRARA) renewing several key provisions of the Act, including Section 5.[332] Specifically, in response to evidence presented at nearly twenty hearings,[333] Congress voted to extend Section 5 for an additional twenty-five years and included amendments that clarified aspects of the provision in response to the Supreme Court's decisions in *Bossier Parish II*[334] and *Georgia v. Ashcroft*.[335]

So if, as this Article contends, compliance with Section 5 did not compel any unconstitutional behavior in the 2000 round of redistricting, the question becomes whether Section 5, as reauthorized in 2006, will compel any unconstitutional behavior in 2010 and beyond. This section argues that none of the changes to Section 5 during the reauthorization process should give rise to any concern of unconstitutional behavior. In particular, I detail how the two aforementioned amendments to Section 5—a reinvigoration of the intent standard and a protection of a community's opportunity to elect their preferred can-

331. *See* VRARA, *supra* note 17.

332. The House passed the bill by a vote of 390 to 33 on July 13, 2006. 152 CONG. REC. H5207 (daily ed. July 13, 2006). The Senate unanimously approved the bill, with a vote of 98 to 0. 152 CONG. REC. S8012 (daily ed. July 20, 2006).

333. *See, e.g.*, Clarke, *supra* note 328; David H. Harris, Jr. & Trish Hardy, *A Good Fix But Not the Cure—Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006*, 29 N.C. CENT. L.J. 224, 229–32 (2007). For more information on the deliberations leading to the reauthorization of Section 5, see generally, for example, Kousser, *supra* note 32; Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 183–91 (2008); Tokaji, *supra* note 25; James Thomas Tucker, *The Politics of Persuasion: Passage of the Voting Rights Act Reauthorization Act of 2006*, 33 J. LEGIS. 205 (2007).

334. 528 U.S. 320 (2000).

335. 539 U.S. 461, 480 (2003).

didate—do not require authors of redistricting plans to use race as a predominant factor or otherwise violate the U.S. Constitution.

A. The *Bossier Parish II* "Fix"

The central holding of *Bossier Parish II* was an interpretation of Section 5's language that preclearance could only be denied if a change was retrogressive in purpose or effect.[336] This interpretation substantially altered the preclearance review process, which previously had involved the denial of any change to election law or procedure that was enacted with an intent to discriminate against minority voters.[337] In the years immediately following the decision, which was issued in January 2000, just prior to the post-2000 round of redistricting, the Justice Department's objections to changes dropped significantly.[338] Only a very small number of objections were based on retrogressive intent.[339] In his statement before the House Judiciary Committee on the effect of *Bossier II* on the enforcement of Section 5's original purpose, Mark Posner, a former attorney with the Department of Justice, testified that "voting changes rarely, if ever, will be motivated by an intent to retrogress [without a corresponding] retrogressive effect."[340]

Taking Posner's and others' testimony into account, the reauthorized Section 5 clarified the language of the provision to ensure that any covered change that was enacted with the intent to discriminate against voters based on race, color, or language minority status would also be denied preclearance.[341] In particular, Congress added language emphasizing that the term "'purpose'" under Section 5 "shall include any discriminatory purpose."[342] As a result, the Jus-

336. *Bossier Parish II*, 528 U.S. at 334. *See supra* text accompanying notes 64–73.

337. Posner, *supra* note 43, at 114–15(describing the effects of the Justice Department's reliance on discriminatory purpose as the basis for objections under Section 5, noting that "discriminatory purpose was the basis for about a third of the objections to post-1980 Census plans and about four-fifths of the objections to post-1990 Census plans").

338. *See* Peyton McCrary, *The End of Preclearance As We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act*, 11 MICH. J. RACE & L. 275, 313–15 (2006) (describing the Justice Department's forty-one objections after the second *Bossier Parish* decision, "compared with 250 objections during a comparable period a decade earlier").

339. *Id.* at 314–15 (describing the two objections based solely on retrogressive intent).

340. Abigail Thernstrom, *Focus On the Voting Rights Act: Section 5 of the Voting Rights Act: By Now, a Murky Mess*, 5 GEO. J.L. & PUB. POL'Y 41, 67 (2007) (citing REPORT TO THE UNITED STATES COMM'N ON CIVIL RIGHTS REGARDING THE EXTENSION OF THE TEMPORARY PROVISIONS OF THE VOTING RIGHTS ACT OF 1965, 18 (2004)).

341. For a detailed account of the specific changes to the language of Section 5 to effect this clarification, see Harris, *supra* note 333, at 244–46; Tucker, *supra* note 333, at 221–22.

342. VRARA, *supra* note 17, at § 5(c).

tice Department was explicitly authorized to resume its pre-2000 practice of denying preclearance to any districting plans or other changes enacted with an intent to discriminate against voters of color.[343]

Enter the preceding analysis of the post-2000 synergy between the *Shaw/Miller* doctrine and Section 5 during the 2000 redistricting cycle, where all Section 5 compliant plans also complied with the Equal Protection Clause restrictions on racial gerrymandering. But there is no indication that Congress's decision to reinstitute the "purpose" prong of Section 5, prohibiting any changes to redistricting or other election laws enacted with a discriminatory purpose, will lead jurisdictions to use race as the predominant factor in their districting decisions, thus violating the Fourteenth Amendment in order to comply with Section 5.

First, the purpose prong of Section 5 fits squarely within the discriminatory intent restriction under the Fourteenth and Fifteenth Amendments of the U.S. Constitution. The Fifteenth Amendment in particular explicitly and clearly prohibits the denial or abridgement of the right to vote "on account of race, color, or previous condition of servitude."[344] By reinstating the purpose prong of Section 5, Congress merely ensured that unconstitutional acts of intentional discrimination, violations of the Fifteenth Amendment, would not be granted preclearance under Section 5.[345] Such an act would seem to be within the scope of Congress's mandate under the Constitution to enforce the Fifteenth Amendment. Reinstating the "purpose prong" therefore ultimately results in ensuring that covered jurisdictions comply with the anti-discrimination provisions of the U.S. Constitution.

In addition, there is no evidence that complying with the Fifteenth Amendment of the Constitution will alter the ease with which covered jurisdictions now comply with both the Equal Protection Clause of the Constitution and the Voting Rights Act. Importantly, the Section 5 objections that led to a dissonance between the two provisions in cases like *Shaw v. Reno* and *Miller v. Johnson* involved violations of Section 5 not based on evidence that the plans diluted minority votes or were

343. *See* Harris, *supra* note 333, at 246–47 (citing to the testimony of Debo Adegbile, Associate Director of Litigation of the NAACP Legal Defense and Educational Fund, Inc., explaining that the change would ensure that "in situations where sufficient evidence of discriminatory intent exists" the submitting jurisdiction will not "meet its Section 5 burden"); Kousser, *supra* note 32, at 754 (arguing that "failure to overturn *Bossier II* would have doomed Section 5 to disuse, as it essentially had since 2000).

344. U.S. CONST. amend. XV.

345. Posner, *supra* note 43, at 416 (noting that the reauthorization of Section 5 and reinstitution of the purpose prong "did not, of course, alter the meaning of this Fourteenth and Fifteenth Amendment right, and Congress did not amend section 5 so as to expand the focus of the statute beyond the right to vote").

potential violations of Section 2 of the Voting Rights Act. The basis for the Justice Department's rejections of North Carolina's congressional districting plans in *Shaw* were not based primarily on a finding that the state legislature was intentionally seeking to discriminate against voters of color in the state. It was based on a determination of vote dilution, or a conclusion that the state was not drawing the maximum number of majority-minority districts that it could under the demographics of the state.[346] It was the revisions of those plans, done at the urging of the Justice Department's efforts to maximize the number of majority-minority congressional districts, that led the North Carolina state legislature to draw district lines that eventually were found to violate the Equal Protection Clause of the Fourteenth Amendment.

Similarly, the revisions of Georgia's congressional districting plan at the center of *Miller v. Johnson* were based upon the Justice Department's rejection of submitted plans because the Department believed that additional majority-minority districts could be created based on its review of alternative plans. As in *Shaw*, it was the Justice Department's requirement of the creation of a third majority-minority district in the state to survive preclearance, and Georgia's use of race as the predominant factor in their districting decisions in acquiescence to that demand, that led Justice Kennedy and a majority of Justices to reject the plan as a violation of the Equal Protection Clause. Other than its refusal to maximize the number of majority-minority districts in its plan, Georgia was not directly accused of acting with a discriminatory purpose in developing its districting plans.[347]

In fact, the Justice Department's rejection of the districting plans in *Shaw* and *Miller* was based primarily on an interpretation of Section 5 that was explicitly overruled in *Bossier Parish I*.[348] That interpretation, which required the rejection of apportionment plans that failed to maximize the number of majority-minority districts or otherwise caused vote dilution in violation of Section 2 of the Voting Rights Act, was discontinued when the Court ruled that such objections were not permitted under Section 5.[349] Notably, none of the amendments

346. *See supra* text accompanying notes 91–119.

347. *See* Posner, *supra* note 43, at 112–13 (arguing that the Supreme Court's criticism of the Justice Department's interpretation of Section 5 was aimed at the Department's policy of maximization, not "purpose-based redistricting objections"); *id.* at 93 (noting that "in *Miller* the [Supreme] Court did not express any concern that section 5's nondiscrimination requirement itself conflicts with the Fourteenth Amendment but instead indicated that the Justice Department's purported illegitimate application of that standard did not comport with the Amendment's dictates").

348. 520 U.S. 471 (1997). *See supra* text accompanying notes 62–63.

349. *Id.*

to Section 5 altered this interpretation.[350] And just as the covered jurisdictions internalized compliance with the *Shaw/Miller* doctrine during the 2000 redistricting cycle,[351] Congress's silence on *Bossier Parish I* implies acquiescence to and acceptance of the Supreme Court's view that preclearance cannot be denied based on the fact or intimation that a plan or election change violates Section 2, or any other provision of the Voting Rights Act.

B. Clarifying *Georgia v. Ashcroft* and the "Ability to Elect"

The other major change to Section 5 during the redistricting process emerged out of an effort to clarify the retrogression standard that the Supreme Court had altered in its 2003 decision in *Georgia v. Ashcroft*.[352] The Court's decision in *Georgia v. Ashcroff*, as discussed previously, found that a districting plan that reduced the voting age population in a few of the State's legislative districts from over 65% African American to just over 50%, and adjusting down other districts so that the African American population went from just over 50% of the VAP, down to 30–40% of the voting age population,[353] was not retrogressive because, under the totality of the circumstances, the Georgia districting plan maintained the ability of African American voters to "play a substantial, if not decisive, role in the electoral process" or to "influence the political process," even if their ability to win elections was diminished.[354]

There has been some debate about whether the VRARA overruled the retrogression standard articulated in *Georgia v. Ashcroft*,[355] in part because the standard itself was somewhat ambiguous. An examination of the textual changes to Section 5 itself and the underlying

350. *See* Posner, *supra* note 43 (discussing how the VRARA did not reverse *Bossier Parish I*).

351. *See supra* text accompanying notes 315–27.

352. 539 U.S. 461 (2003). *See also supra* text accompanying notes 67–73.

353. *Id.*

354. For further discussion on the implications of the *Georgia v. Ashcroft* retrogression standard, see generally, for example, Karlan, *supra* note 2; McCrary, *supra* note 338, at 315–22 (describing the various types of districting schemes that would not be retrogressive under the holding in *Georgia v. Ashcroft*).

355. *See, e.g.*, David L. Epstein & Sharyn O'Halloran, *Does the New VRA Section 5 Overrule* Georgia v. Ashcroft*?*, 63 N.Y.U. ANN. SURV. AM. L. 631 (2008) (concluding that the effect of the amendments to VRARA did not alter or overrule the Court's opinion in *Georgia v. Ashcroft* "in any meaningful way because, regardless of how it is interpreted, the VRARA either (a) allows a diminution of the overall probability that minorities are elected to office or (b) allows states to make exactly the types of tradeoffs in favor of influence districts that supporters of the new language sought to avoid"); Kousser, *supra* note 32, at 757; Tucker, *supra* note 333, at 222–23 (noting that "the VRARA restored the standard for determining discriminatory [retrogressive] effect that had been in place for three decades" until *Georgia v. Ashcroft*).

legislative record and reports from the House Judiciary Committee indicates that the amendments primarily clarify the retrogression standard under Section 5 to emphasize that "ability to influence" is not the same as "ability to elect."[356] Thus, most plans will likely be found retrogressive if, when compared with the benchmark plan they are replacing, they substitute majority-minority districts (where the voting strength of minority voters can determine the winner in an electoral contest) with influence districts (districts where minority voters can exert influence over who wins an electoral contest and/or their subsequent policy decisions).[357] In that way, the amendments to Section 5 do reject the Supreme Court's analysis in *Georgia v. Ashcroft*, because central to that decision was Justice O'Connor's determination that the replacement of majority-minority districts with influence districts was not retrogressive because the plan did not diminish African Americans' ability to influence the electoral process.[358]

But at the same time, a districting plan that replaces majority-minority districts with influence districts may not be retrogressive per se if the community's ultimate "ability to elect" their candidate of choice is not diminished.[359] This is because the amendments to Section 5 emphasize that the provision is in place to protect a community's ability to elect candidates of their choice, not merely influence the outcome of the election or the policy choices of elected officials. Indeed, the actual language that Congress added to Section 5 in 2006 states specifically that any "voting qualification or prerequisite to voting, or standard, or practice, or procedure with respect to voting that has the purpose of or will have the effect of *diminishing the ability* of any citizens of the United States on account of race or color, . . . *to elect their*

356. *See also* Persily, *supra* note 333, at 247–49 (arguing that "the new section 5 squarely rejects the notion that ability-to-elect districts can be eliminated (or traded off with influence districts) as part of an overall plan to increase minority influence in the legislature as a whole").

357. *See, e.g.*, Epstein & O'Halloran, *supra* note 355, at 651 (noting that "the standard rejects the notion that 'ability-to-elect' districts can be traded for 'influence' districts"); Erica Lai, *Appended Post-Passage Senate Judiciary Committee Report: Unlikely "Legislative History" For Interpreting Section 5 of the Reauthorized Voting Rights Act*, 156 U. PA. L. REV. 453, 467 (2007) (describing how congressional leaders involved in crafting the new standard "condemned influence and coalition districts as failing to ensure that minorities retain their ability to elect their candidates of choice"). For a detailed discussion of the implications of such "trade-offs" and the effects of influence districts generally, see Persily, *supra* note 333, at 235–37.

358. Persily, *supra* note 333, at 234–36 (noting that the *Georgia v. Ashcroft* holding "relaxed the constraint of section 5 by allowing covered jurisdictions to trade off 'ability to elect' districts with so-called influence districts").

359. For an extensive discussion on the various interpretations of the ability to elect standard, see Persily, *supra* note 333, at 235–45.

preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section."[360]

There was and is still considerable debate over how great a percentage of the voting age population a group must comprise in order to have the "ability to elect" their candidate of choice.[361] But under the new language it is feasible that, in the few situations where minority voters are "able to elect" candidates of their choice in districts where they comprise less than 50% of the voting age population, covered jurisdictions might not be required to draw or even maintain districts where the minority group comprises more than 50% of the voting age population (majority-minority districts). Or, as was the case in *Georgia v. Ashcroft*, under the amended Section 5, a plan that takes voters of color out of majority-minority districts and places them in districts where they are less than a majority of the voting age population will not be retrogressive—but only when the facts on the ground indicate that minority voters in influence districts will maintain their ability or power to elect the candidate of their choice.[362]

And importantly, the 2006 amendments to Section 5 comport with the Court's attempt in *Georgia v. Ashcroft* to create a more flexible retrogression analysis that considers multiple factors in analyzing whether a new plan diminishes a community's ability to elect their candidate of choice. Thus, under the new standard, while a reduction in the number of majority-minority districts will generally have a retrogressive effect on a community's ability to elect the representative of their choice, Section 5 compliance now may not necessarily require the creation or maintenance of majority-minority districts in areas where minority voters are able to elect their candidates of choice through building reliable and consistent partnerships with other constituencies, including white voters.[363] In addition, the congressional record

360. VRARA § 5(3)(b), *supra* note 17 (emphasis added).

361. *See* Kousser, *supra* note 32, at 755–58 (describing the congressional deliberations over the "ability to elect" language and noting that "[t]he crucial point, which was left in a muddle, was how large the group had to be in order to be considered able to elect its preferred candidate"). *See also* Persily, *supra* note 333, at 234–36 (describing the existing "disagreement about . . . how one determines minorities' 'ability to elect'").

362. *See* Tucker, *supra* note 333, at 263 (emphasizing the "fact-specific" nature of the "ability to elect" standard, noting that the language "recognizes that minority voters may be able to elect candidates of their choice with reliable crossover support and, thus, does not mandate the creation and maintenance of majority-minority districts in all circumstances").

363. *See, e.g.*, Epstein & O'Halloran, *supra* note 355, at 651. See remarks from Senator Leahy during the reauthorization (noting that "[t]he amendment to section 5 does not, however, freeze into place the current minority voter percentages in any given district. . . . There is no 'magic number' that every district must maintain to satisfy the 'ability to elect' standard. . . ."). 152 CONG. REC. S8005 (daily ed. July 20, 2006) (statement of Sen. Leahy).

indicates that the "ability to elect" language also protects the maintenance or creation of "naturally occurring majority-minority districts," or districts drawn with the use of "legitimate, neutral principles . . . such as attention to county and municipal borders," that just happen to capture or include a "large and compact minority population," thus creating, naturally, a "district in which racial minorities form a majority."[364]

In part because of the new standard's flexibility and recognition of "naturally occurring" districts, it is highly unlikely that efforts to comply with the new standard will alter the synergy between the Equal Protection Clause and Section 5 exhibited during the 2000 redistricting process. For one, the plans at issue in all of the redistricting cases following the 2000 census, as described in Part II of this Article, were pre-cleared prior to the Court's alteration of the retrogression standard in *Georgia v. Ashcroft*.[365] Thus, even if the amended standard simply and explicitly rejected the court's holding in *Georgia v. Ashcroft* and returned the retrogression standard to its previous state, the 2000 round of redistricting illustrates that, in the years since the *Miller* decision, states have developed satisfactory methods of complying with both the pre-*Georgia v. Ashcroft* retrogression standard and the requirements of the *Shaw/Miller* doctrine.

In addition, the Court's paramount concern in *Miller* in particular was that the Justice Department was enforcing Section 5 in a way that mandated that states create or maximize the number of majority-minority districts included in any particular plan.[366] As discussed above, the VRARA's "ability to elect" clarification promotes a fact-intensive analysis of whether, under a new plan, the ability of a minority voting population to elect their candidate of choice is diminished. Such a review may allow for the replacement of majority-minority districts with influence districts. As discussed above, the retrogression analysis also allows for preclearance when plans draw "naturally occurring" majority-minority districts, which is directly in line with the *Shaw/Miller* doctrine of ensuring that traditional districting princi-

364. One narrow view of the amendments to Section 5 is that retrogression only occurs when covered jurisdictions submit plans that do not include naturally occurring majority-minority districts, but this interpretation is not the dominant view. For a detailed discussion of why this interpretation is problematically narrow, see Epstein & O'Halloran, *supra* note 355, at 649–51 (noting that, among other things, retrogression should not apply only to minority voters living in urban areas, as opposed to minority voters elsewhere in the state and that such an interpretation is based on inherently partisan interests). For a detailed discussions on the origins of the "naturally occurring" interpretation of the "ability to elect" language in the Senate Report, see Lai, *supra* note 357, at 469–71.

365. *See supra* text accompanying notes 351–62.

366. Miller v. Johnson, 515 U.S. 900, 920–22 (1995).

pals are paramount to racial considerations in drawing district lines.[367]

Because we are still a few years removed from the 2010 redistricting cycle, there has yet to be any significant evidence of just how the Justice Department will interpret and apply either amendments to the renewed Section 5. But all realistic indications and perspectives on their possible application signify that the Justice Department's enforcement power was not altered in such a way that it would return the Department to its previous—post-1990, pre-2000—method of reviewing apportionment plans that led to Justice Kennedy's critique of the Department in *Miller*.

V. CONCLUSION

As the preceding analysis indicates, a review of the actions on behalf of Congress, the Justice Department, and the covered jurisdictions in the years following the introduction of the *Shaw/Miller* doctrine indicate that entities appear to have internalized full compliance with that line of decisions. First, an entire redistricting cycle has been completed following the 2000 Census, during which there was not one instance in which a court found that a jurisdiction covered under Section 5 was compelled, in its efforts to comply with the provision, to violate the racial gerrymandering restriction of the Equal Protection Clause. Second, the above review of the changes to Section 5 during the 2006 reauthorization process indicates that none of the substantive amendments to the provision stand to threaten the synergy between the two provisions. All indications are that covered jurisdictions have fully adapted to the requirements of *Shaw* and *Miller*, and there is little evidence that the recent changes to Section 5 will compel jurisdictions alter their already internalized compliance with the Constitution.

As a result, the concerns raised in Justice Kennedy's concurrence in *Georgia v. Ashcroft* have indeed been addressed in both the judicial and legislative cabining of the Justice Department's enforcement of Section 5 and covered jurisdictions' own efforts to comply with the requirements of the Equal Protection Clause. The "fundamental flaw" that Kennedy refers to in *Georgia v. Ashcroft* is a flaw no longer. When it comes to redistricting plans, Section 5 and the Equal Protection Clause are able to enjoy a shared existence.

367. *See* Persily, *supra* note 333, at 239 (referring to the standard's "focus on naturally occurring majority-minority districts" as an "admonition to the DOJ to avoid forcing jurisdictions to create or maintain *Shaw*-violative districts").